TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~337.~~ 68

OAKES A. AMES, FREDERICK L. AMES, AND OLIVER AMES, THIRD, SURVIVORS OF THEMSELVES AND OAKES AMES AND OLIVER AMES, DECEASED, COPARTNERS UNDER THE FIRM-NAME OF OLIVER AMES & SONS, PLAINTIFFS IN ERROR,

VS.

ICHABOD L. QUIMBY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 14, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 337.

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1 The Supreme Court of the United States.

OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3rd, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons, plaintiffs in error,
vs.
ICHABOD L. QUIMBY, DEFENDANT IN ERROR.

Know all men by these presents that we, Oakes A. Ames, Frederick L. Ames, and Oliver Ames, 3rd, of Easton, county of Bristol, and State of Massachusetts, and George V. N. Lathrop, of Detroit, Michigan, are held and firmly bound unto Ichabod L. Quimby, of Grand Rapids, Michigan, in the sum of twenty-five thousand dollars, to be paid to the said Ichabod L. Quimby, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this fourth day of August, A. D. 1879.

Whereas the above-named Oakes A. Ames, Frederic L.
2 Ames, and Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the western district of Michigan, southern division:

Now, therefore, the condition of this obligation is such that if the above-named Oakes A. Ames, Frederic L. Ames, and Oliver Ames, 3rd, shall prosecute this said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

OAKES A. AMES. [SEAL.]
FREDERICK L. AMES. [SEAL.]
OLIVER AMES, 3RD, [SEAL.]
GEO. V. N. LATHROP. [SEAL.]

I hereby approve of the foregoing bond, this 9th day of August, A. D. 1879.

S. L. WITHEY,
Dist. Judge.

3 (Indorsed:) Supreme Court of the United States. Oakes A. Ames, Frederick L. Ames, et al., plaintiffs in error, vs. Ichabod L. Quimby, defendant in error. Bond on writ of error. Copy.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between Ichabod L. Quimby, plaintiff, a manifest error hath happened, to the great damage of the said Oakes A. Ames, Frederick L. Ames, & Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons, defendants, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy

justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] HENRY M. HINSDILL,
Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

Allowed by—

S. L. WITHEY,
Dist. Judge.

5 (Indorsed:) No. 387. U. S. cir. c't west. dist. of Mich. Ichabod L. Quimby, def't in error, vs. Oakes A. Ames et al., pl'ff in error. Writ of error. Filed Aug. 9, 1879. H. M. Hinsdill, clerk. Hughes, O'Brien & Smiley, att'ys for pl'ff in error.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between Ichabod L. Quimby, plaintiff, a manifest error hath happened to the great damage of the said Oakes A. Ames, Frederick L. Ames, & Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons, defendants, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] HENRY M. HINSDILL,
Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

Allowed by—

S. L. WITHEY,
Dist. Judge.

7 WESTERN DISTRICT OF MICHIGAN,
County of Kent, ss:

Isedore Danziger, being duly sworn, deposes and says that on the 9th day of August, 1879, he served a writ of error of which the foregoing is a copy, on Messrs. Norris & Uhl, attorneys for defendant in error in the said cause, by delivering a copy thereof to Mr. E. F. Uhl personally, one of said attorneys.

I. DANZIGER.

Subscribed & sworn to before me this 12th day of August, A. D. 1879.

JOHN PATTON, JR.,
Notary Public, Kent County, Mich.

WESTERN DISTRICT OF MICHIGAN, *ss:*

T. J. O'Brien, being duly sworn, says that on the 9th day of August, 1879, he served the writ of error of which the within is a true copy by delivering the same personally to Henry M. Hinsdill, clerk of the circuit court of the United States for the said district, and at the same time he lodged in said clerk's office a true copy of said writ of error for the defendant in error named in said writ.

T. J. O'BRIEN.

Subscribed and sworn to before me this 14th day of August, 1879.

D. D. HUGHES, JR.,
Notary Public, Kent Co., Mich.

(Indorsed:) No. 387. The circuit court of the U. S. for western dist. of Michigan. Oliver Ames, 3d, et al., vs. Ichabod L. Quinby. Proof of service of writ of error. Filed August 14, 1879. H. M. Hinsdill, cl'k.

8 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and western district of Michigan, southern division, wherein Oakes A. Ames, Frederick L. Ames, and Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames & Sons, are plaintiffs in error and you (Ichabod L. Quimby) defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 9th day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

S. L. WITHEY,
Dist. Judge.

9 WESTERN DISTRICT OF MICHIGAN,
County of Kent, ss:

Isedore Danziger, being duly sworn, deposes and says that on the ninth day of August, 1879, he served the foregoing citation on Messrs. Norris & Uhl, attorneys for the defendant in error in said cause, by

delivering a true copy thereof to Mr. E. F. Uhl, one of said attorneys, personally. Further deponent saith not.

I. DANZIGER.

Subscribed & sworn to before me this 12th day of August, 1879.

HENRY M. HINSDILL,
U. S. Commissioner.

(Indorsed:) No. 387. U. S. cir. c't, west. dist. of Mich. Oakes A. Ames et al., pl'ffs in error, vs. Ichabod L. Quimby, def't in error. Citation. Filed August 9, 1879. H. M. Hinsdill, cl'k. Hughes, O'Brien & Smiley, att'ys for pl'ffs in error.

10 *Summons.*

STATE OF MICHIGAN,
County of Kent, ss:

The circuit court for the county of Kent to the sheriff of the county of Kent, greeting:

[L. S.] In the name of the people of the State of Michigan you are commanded to summon Oakes Ames, Oliver Ames, jr., Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, to be and appear before the circuit court of the county of Kent, at the court-house, in the city of Grand Rapids, Michigan, upon the 6th day of August, A. D. 1872, then and there to answer unto Ichabod L. Quimby in a plea of trespass on the case upon promises, damage twenty-five thousand dollars, which shall then and there be made to appear, and of this writ make due return.

Witness the Hon. Birney Hoyt, circuit judge of the said circuit court, at Grand Rapids, this 16th day of July, A. D. one thousand eight hundred and seventy-two.

HOBART H. CHIPMAN, *Clerk.*

NORRIS & BLAIR,
Plaintiff's Attorneys.

11 (Indorsed:) The circuit court for the county of Kent. Ichabod L. Quimby vs. Oakes Ames et al. Summons. Returned and filed July 16, 1872. Hobart H. Chipman, clerk, by Wm. H. Van Leenwen, jr., dep'ty. Norris & Blair, plaintiff's att'ys.

12 STATE OF MICHIGAN:

The circuit court for the county of Kent.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JUNIOR, OAKES A. Ames, Frederick L. Ames, and Oliver Ames, 3rd.

KENT COUNTY, *ss:*

Ichabod L. Quimby, of Grand Rapids, in said county, being duly sworn, says that he is the above-named plaintiff, and that a personal action, arising upon contract, has been commenced by the above-named plaintiff against Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick L. Ames, and Oliver Ames, 3rd, who are copartners under the

firm-name of Oliver Ames & Sons, defendants above named, and non-residents of the State of Michigan, and residents of the State of Massachusetts, in the circuit court for the county of Kent, by summons issued out of and under the seal of said court. This affiant further says that the said Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick L. Ames, and Oliver Ames, 3rd, defendants, are justly indebted to the said plaintiff in the sum of eleven thousand dollars over and above all legal set-offs.

And that said plaintiff is justly apprehensive of the loss of the
13 same unless a writ of garnishment issue to Wilder D. Foster, of said city of Grand Rapids, Kent County, and State of Michigan, and that this affiant has good reason to believe and does believe that the said Wilder D. Foster has property, money, goods, chattels, credits, and effects in his hands and under his control belonging to the said Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick L. Ames, and Oliver Ames, 3rd, and that said Wilder D. Foster is justly indebted unto the said Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick L. Ames, and Oliver Ames, 3rd, copartners as aforesaid, and that said indebtedness is now due.

(Signed) ICHABOD L. QUIMBY.

Subscribed and sworn to before me this 16th day of July, A. D. 1872.

C. M. McLAREN,
Notary Public, Kent County, Michigan.

(Indorsed:) Circuit court for county of Kent. Ichabod L. Quimby vs. Oakes Ames et al. Aff'd't for writ of gar. Rec'd & filed July 16th, 1872. Hobart H. Chipman, by Wm. H. Van Leewen, jr., dep'ty. Norris & Blair, pl'ff's att'ys.

14 *Writ of garnishment.*

STATE OF MICHIGAN,
County of Kent, ss:

The circuit court for the county of Kent.

In the name of the people of the State of Michigan to the sheriff of the county of Kent, greeting:

Whereas Ichabod L. Quimby, as plaintiff, has commenced a personal action, arising upon contract, in the circuit court for the county of Kent, against Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, as defendants, by summons issued out of and under the seal of said court, and has filed in the office of the clerk of said court the affidavit of the said plaintiff, stating, amongst other things, that he has good reason to believe, and does believe, that Wilder D. Foster, of the city of Grand Rapids, Kent County, Michigan, has property, money, good', chattels, credits, and effects in his hands and under his control belonging to the said defendants, and that the said Wilder D. Foster is justly indebted to the said defendants, and that said indebtedness is now due, and that said defendants are justly indebted to the said plaintiff in the sum of eleven thousand dollars over and above all legal set-offs, and that the said plaintiff is justly apprehensive of the loss of the same unless a writ of garnishment issued to the aforesaid Wilder D. Foster:

Now, therefore, you are hereby commanded to warn and summons the said Wilder D. Foster to appear before said court on Tuesday the

sixth day of August, A. D. 1872, to make disclosure in writing, under oath, to be filed with the clerk of said court, touching the liability of said Wilder D. Foster as garnishee of Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, the principal defendants, as charged in the said affidavit, and that said Wilder D. Foster thenceforth pay no money and deliver no property or effects to the said Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, defendant in said action, until discharged.

And of this writ you shall make due return to the said circuit court on the sixth day of August next.

Witness the Hon. Birney Hoyt, circuit judge, at city of Grand Rapids, this sixteenth day of July, one thousand eight hundred and seventy-two.

[L. S.] HOBART H. CHIPMAN, *Clerk*,
By WM. H. VAN LEENWAN, JR., *Dep't.*

, *Att'y for Plaintiff.*

15 STATE OF MICHIGAN,
County of Kent, ss:

I hereby certify and return that on the 16th day of July, A. D. 1872, in said county, I served the within writ upon Wilder D. Foster, the garnishee therein named, by showing the same to Wilder D. Foster and at the same time delivering to Wilder D. Foster a true copy of said writ.

Dated this 16th day of July, 1872.

Fees: Service of writ, ; mileage, ; copies, $1.10.

JESSE F. WYCKOFF,
Sheriff of said County,
By D. F. THURSTON,
Under Sheriff.

(Indorsed:) No. . Circuit court for the county of Kent. Ichabod L. Quimby vs. Oakes Ames et al., prin. def'ts. Wilder D. Foster, gar. Writ of garnishment. Rec'd & filed July 16th, A. D. 1872. Hobart H. Chipman, clerk, Wm. H. Van Leenwan, jr., dep't. Norris & Blair, att'ys for pl'ff.

16 STATE OF MICHIGAN:

The circuit court for the county of Kent.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick Ames, and Oliver Ames, 3rd.

Wilder D. Foster, who has been named and garnisheed by summons issued in the above cause, comes into this court and, for disclosure according to the form of the statute in such case made and provided, says that he did, at the time of the issuing of the summons, have property, goods, and effects in his hands, and under his control, belonging to the said defendants, of the value of thirteen hundred ninety-eight and $\frac{43}{100}$ dollars (1,398.43), being balance due from this deponent to said defendants upon account stated under the firm-name of Oliver Ames & Sons.

(Signed) WILDER D. FOSTER.

KENT COUNTY, *ss:*

Wilder D. Foster, the garnishee above named, being duly sworn, says that he has read the foregoing disclosure by him subscribed, and knows the contents thereof, and that the same is true in substance and matter of fact.

(Signed) W. D. FOSTER.

Subscribed and sworn to before me this 13th day of August, A. D. 1872.

WILDER D. STEVENS,
Notary Public, Kent County, Michigan.

17 (Indorsed:) Kent circuit court. Ichabod L. Quimby vs. Oakes Ames et al. Disclosure of W. D. Foster. Rec'd & filed August 14th, A. D. 1872. Hobart H. Chipman, clerk, by Wm. H. Van Leenwen, dep'ty.

18 STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Isaiah Paine, jr., being duly sworn, says that on the 23rd day of July, A. D. 1872, he served on Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, a true copy of the summons, affidavit, and writ of garnishment, with return of service thereon endorsed, of which the attached are true copies, together with a written notice signed by Norris and Blair, attorneys for the plaintiff named in said summons, of which notice that hereto attached is a true copy, by delivering the same to each of the defendants named in said summons, in said State of Massachusetts.

(Signed) I. PAINE, JR.

Subscribed and sworn to before me by the said Isaiah Paine, jr., this 23rd day of July, A. D. 1872.

[L. S.] DANIEL SHARP,
Commissioner for the State of Michigan.

19 *Copy summons.*

STATE OF MICHIGAN,
County of Kent, ss:

The circuit court for the county of Kent to the sheriff of the county of Kent, greeting:

[SEAL.] In the name of the people of the State of Michigan you are commanded to summon Oakes Ames, Oliver Ames, jr., Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, to be and appear befoer the circuit court of the county of Kent, at the court-house in the city of Grand Rapids, Michigan, upon the 6th day of August, A. D. 1872, then and there to answer unto Ichabod L. Quimby in a plea of trespass on the case upon promises, damage twenty-five thousand dollars, which shall then and there be made to appear; and of this writ make due return.

Witness the Hon. Birney Hoyt, circuit judge of the said circuit court, at Grand Rapids, this 16th day of July, A. D. one thousand eight hundred and seventy-two.

HOBART H. CHIPMAN, *Clerk.*

NORRIS & BLAIR,
Plaintiff's Attorney.

20 (Indorsed:) The circuit court for the county of Kent. Ichabod L. Quimby vs. Oakes Ames et al. Summons. Returned and filed July 16, 1872. Hobart H. Chipman, clerk, by Wm. H. Van Leenwan, dep't. Norris & Blair, plaintiff's att'ys.

21 STATE OF MICHIGAN:

The circuit court for the county of Kent.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JUNIOR, OAKES A. AMES, FREDERICK AMES, and OLIVER AMES, 3rd.

KENT COUNTY, *ss:*

Ichabod L. Quimby, of Grand Rapids, in said county, being duly sworn, says that he is the above-named plaintiff, and that a personal action arising upon contract has been commenced by the above-named plaintiff against Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, who are copartners under the firm-name of Oliver Ames & Sons, defendants above-named, and non-residents of the State of Michigan and residents of the State of Massachusetts, in the circuit court for the county of Kent, by summons issued out of and under the seal of said court. This affiant further says that the said Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, defendants, are justly indebted to the said plaintiff in the sum of eleven thousand dollars over and above all legal set-offs, and that said plaintiff is justly apprehensive of the
22 loss of the same unless a writ of garnishment issue to Wilder D. Foster, of said city of Grand Rapids, Kent County, and State of Michigan. And that this affiant has good reason to believe and does believe that the said Wilder D. Foster has property, money, goods, chattels, credits, and effects in his hands and under his control belonging to the said Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, and that the said Wilder D. Foster is justly indebted unto the Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, copartners as aforesaid, and that the said indebtedness is now due.

ICHABOD L. QUIMBY.

Subscribed and sworn to before me this 16th day of July, A. D. 1872.
C. M. McLAREN,
Notary Public, Kent County, Michigan.

(Indorsed:) The circuit court for the county of Kent. Ichabod L. Quimby vs. Oakes Ames et al. Aff'd't for writ of gar. Rec'd & filed July 16th, 1872. Hobart H. Chipman, clerk, by Wm. H. Van Leenwen, jr., dep't. Norris & Blair, pl'ff's att'ys.

23 *Writ of garnishment.*

STATE OF MICHIGAN,
County of Kent, ss:

The circuit court for the county of Kent.

In the name of the people of the State of Michigan, to the sheriff of Kent, greeting:

Whereas Ichabod L. Quimby, as plaintiff, has commenced a personal

action, arising upon contract, in the circuit court for the county of Kent, against Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, as defendants, by summons issued out of and under the seal of said court, and has filed in the office of the clerk of said court the affidavit of the said plaintiff, stating, amongst other things, that he has good reason to believe, and does believe, that Wilder D. Foster, of the city of Grand Rapids, Kent County, Michigan, has property, money, goods, chattels, credits, and effects in his hands and under his control belonging to the said defendants, and that said Wilder D. Foster is justly indebted to the said defendants, and that said indebtedness is now due, and that said defendants are justly indebted to the said plaintiff in the sum of eleven thousand dollars over and above all legal set-offs, and that the said plaintiff is justly apprehensive of the loss of the same unless a writ of garnishment issued to the aforesaid Wilder D. Foster:

Now, therefore, you are hereby commanded to warn and summons the said Wilder D. Foster to appear before said court on Tuesday, the sixth day of August, A. D. 1872, to make disclosure in writing, under oath, to be filed with the clerk of said court, touching the liability of said Wilder D. Foster as garnishee of Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, the principal defendant, as charged in the said affidavit, and that said Wilder D. Foster, thenceforth pay no money and deliver no property or effects to the said Oakes Ames, Oliver Ames, junior, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, defendant in said action, until discharged.

And of this writ you shall make due return to the said circuit court on the sixth day of August next.

Witness the Hon. Birney Hoyt, circuit judge, at the city of Grand Rapids, this sixteenth day of July, one thousand eight hundred and seventy-two.

[COPY L. OF S. SEAL.] HOBART H. CHIPMAN, *Clerk*,
By WM. H. VAN LEENWEN, *Dept.*

, *Att'y for Plaintiff.*

24 STATE OF MICHIGAN,
County of Kent, ss:

I hereby certify and return that on the 16th day of July, A. D. 1872, in said county, I served the within writ upon Wilder D. Foster, the garnishee therein named, by showing the same to Wilder D. Foster, and at the same time delivering to Wilder D. Foster a true copy of said writ.

Dated this 16th day of July, 1872.

Fees: Service of writ, ; mileage, ; copies, $1.10.
JESSE F. WYCKOFF,
Sheriff of said County.
By D. F. THURSTON, *Under Sheriff.*

(Indorsed:) No. . Circuit court for the county of Kent. Ichabod L. Quimby vs. Oakes Ames et al., plaintiffs. Wilder D. Foster, gar. Writ of garnishment. Filed , A. D. 18 . , clerk. Norris & Blair, att'ys for pl'ff.

25 To the within-named defendants:

Take notice that you and each of you are hereby required to appear and defend the suit commenced by summons of which the an-

nexed is a true copy, within thirty days after service on you of copy of said summons and copy of affidavit and writ of garnishment with return of service endorsed thereon, of which the annexed are true copies, or default will be entered and judgment taken against you.

NORRIS & BLAIR,
Plaintiff's Att'ys.

Dated GRAND RAPIDS, *July* 16th, 1872.

26 (Indorsed:) State of Michigan. The circuit court for the county of Kent. Ichabod L. Quimby vs. Oakes Ames et al. Copy of sum., affid't, & writ, & notice. Rec'd & filed Aug. 26th, 1872. Hobart H. Chipman, clerk. Norris & Blair, pl'ff's att'ys.

27 The circuit court for the county of Kent.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, OAKES A. AMES, Frederick L. Ames, and Oliver Ames, 3rd.

SIR: Please to enter our appearance for the defendants in this cause.
Yours, &c.,

HUGHES, O'BRIEN & SMILEY,
Def'ts' Att'ys.

Dated Aug. 26th, 1872.
To H. H. CHIPMAN, Esq., *Clerk.*

28 (Indorsed:) Kent circuit. Ichabod L. Quimby vs. Oakes Ames et al. Præcipe for entry of appearance. Rec'd & filed Aug. 26th, 1872. Hobart H. Chipman, clerk. Hughes, O'Brien def'ts' & Smiley, att'ys.

STATE OF MICHIGAN:

The circuit court for the county of Kent.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, OAKES A. AMES, Frederick L. Ames, and Oliver Ames, 3rd. } Assumpsit. Aug. 26th, 1872.

In this cause, on motion of Hughes and O'Brien, defendants' attorneys, it is ordered that the appearance of the said defendants be, and the same is hereby, entered herein.

HUGHES AND O'BRIEN,
Defendants' Attorneys.

30 STATE OF MICHIGAN:

In the circuit court for the county of Kent.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JUNIOR, OAKES A. Ames, Frederick Ames, and Oliver Ames, 3rd.

KENT COUNTY, *ss:*

To the circuit court for the county of Kent:

The petition of Oakes Ames, Oliver Ames, Oakes A. Ames, Frederick

Ames, and Oliver Ames, 3rd, respectfully represent that they compose the firm of Oliver Ames & Sons, doing business at North Easton, in the State of Massachusetts, and that they are the defendants in the above-entitled cause, impleaded by the names in the title above set forth; that they now are, and at the time of the commencement of said suit were, severally citizens of the State of Massachusetts; that said plaintiff then was and now is a citizen of the State of Michigan; that the action in this cause is assumpsit, commenced against them as non-residents, under the provisions of the garnishee act of the State of Michigan, a writ of garnishment having been issued against Wilder D. Foster, of said Kent County; that the debt alleged to be due from defendants to plaintiff, as set up in the affidavit of plaintiff, is the sum
31 of eleven thousand dollars; that your petitioners are willing and ready to offer and give good and sufficient for their entering in the circuit court of the United States for the western district of Michigan, on the first day of its term next to be held, copies of all the processes in said suit, and also for their appearance in said cause in said court at the same time.

Whereupon your petitioner' prays that said security may be accepted, and that said cause may be removed to said circuit court of the United States for the western district of Michigan for trial therein at the next term thereof to be held district, and that this court proceed no further in said cause. And your petitioners will ever pray.

OAKES AMES,
OLIVER AMES, JR.,
OAKES A. AMES,
FREDERICK L. AMES,
OLIVER AMES, 3RD,
By HUGHES, O'BRIEN & SMILEY,
Their Attorneys.

STATE OF MICHIGAN,
Wayne County, ss:

George V. N. Lothrop, of the city of Detroit, in said county & State, being duly sworn, deposes and says that he knows personally all the parties, plaintiff and defendants, in the above-entitled cause,
32 and has known them for many years; that he has read the foregoing petition, and knows that the facts therein set forth are true.

GEO. V. N. LOTHROP.

Subscribed and sworn to before me this thirty-first day of July, A. D. 1872.

D. BETHUNE DUFFIELD,
Notary Public, Wayne Co., Mich.

33 (Indorsed:) Circuit court for the county of Kent. Ichabod L. Quimby vs. Oakes Ames et al. Petition. Rec'd & filed Aug. 26th, 1872. Hobart H. Chipman, clerk.

34 Know all men by these presents that we, D. Darwin Hughes, Thomas J. O'Brien, and Mitchell J. Smiley, of the city of Grand Rapids, in the county of Kent and State of Michigan, are jointly and severally held and firmly bound unto Ichabod L. Quimby, of the same place, in the penal sum of one thousand dollars, for which well and truly to be paid unto the said Ichabod L. Quimby, his heirs, executors, administrators, and assigns, we bind ourselves, our heir', executors, ad-

42 In the circuit court of the United States for the western district of Michigan.

OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick L. Ames, Oliver Ames, 3d, *ads.* ICHABOD L. QUIMBY.

The clerk will please enter the appearance of the defendants in this cause by us as their attorneys.

HUGHES, O'BRIEN & SMILEY,
Def'ts' Att'ys.

To ISAAC H. PARRISH, *Clerk.*

43 387. U. S. court. Oakes Ames et al. ads. Ichabod L. Quimby. Præcipe. Filed Oct. 21st, 1872. Isaac H. Parrish, clerk.

44 UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan, as yet of the October term of said court for the year A. D. 1872, to wit, of the 14th day of November, A. D. 1872.

WESTERN DISTRICT OF MICHIGAN, *ss:*

Ichabod L. Quimby, who is a citizen of the State of Michigan, plaintiff in this suit, by Norris & Blair, his attorneys, complains of Oakes Ames, Oliver Ames, jr., Oakes A. Ames, Frederick L. Ames, and Oliver Ames, 3rd, defendants herein, who are all citizens of the State of Massachusetts, and have been summoned to answer said plaintiff in a plea of trespass on the case upon premises.

For that whereas the said defendants, on the first day of June, in the year of our Lord one thousand eight hundred and seventy-two, at said western district, were indebted to the said plaintiff in the sum of twenty-five thousand dollars, lawful money of the United States of America, for divers shovel-handles, goods, wares, and merchandise by the said plaintiff before that time, then sold and delivered to the said defendants, at the special instance and request of the said defendants, and being so indebted to the said plaintiff, the said defend-
45 ants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, were indebted to the said plaintiff in the sum of twenty-five thousand dollars of like lawful money aforesaid for so much money by the said defendants before that time had and received to and for the use of the said plaintiff. And being so indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to

the said plaintiff in the sum of fifteen thousand dollars of like lawful money for so much money before that time and then due and
46 payable from the said defendants to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said plaintiff, and by the said plaintiff forborne to the said defendants for divers long spaces of time before then elapsed, at the like special instance and request of the said defendants, and being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants, although often requested, have not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused and still do refuse, to the damage of the said plaintiff of twenty-five thousand dollars, and therefore the said plaintiff brings suit, &c.

NORRIS & BLAIR,
Att'ys for Pl'ff.

47 (Indorsed:) 387. The circuit court of the United States for the west'rn dist. of Michigan. Ichabod L. Quimby vs. Oakes Ames et al. Narr. Rec'd and filed this 14th day of November, A. D. 1872, at 2.20 p. m. Horace Tompkins, dep'ty clerk. Norris & Blair, att'ys for pl'ff.

48 The circuit court of the United States for the 6th circuit and western district of Michigan.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick L. Ames, and Oliver Ames, 3rd.

To the clerk of this court:

On reading and filing the affidavit of L. D. Norris herewith, you will please enter the default of the defendants for want of filing and service of plea or demurrer by the said defendants to the declaration of the plaintiff heretofore filed and served.

Dated December 18th, 1872.

NORRIS & BLAIR,
Plaintiff's Attorneys.

49 (Indorsed:) 387. U. S. circuit court, west. dist. of Michigan. Ichabod D. Quimby vs. Oakes Ames et al. Præcipe for default. Filed Dec. 18th, 1872. Isaac A. Parrish, clerk. Norris & Blair, pl'ff's att'ys.

50 The circuit court of the United States for the 6th circuit and western district of Michigan.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick L. Ames, and Oliver Ames, 3rd.

WESTERN DISTRICT OF MICHIGAN,
Kent County, ss:

Lyman D. Norris, being duly sworn, says that he is one of the attorneys for the plaintiff herein, that this cause was transferred from the Kent County circuit court to this court, and filed here on the 21st day of October last, being the first of the October term of this court; that the defendants, by Hughes, O'Brien & Smiley, their attorneys, entered their appearance the same day in this court; that the plaintiff filed his declaration here and herein on the 14th day of November last, and on the same day served a true copy of such declaration on the defendants' attorneys; that on the 29th day of said November the defendants' attorneys served upon the plaintiff's attorneys a demand for a bill of particulars of the plaintiff's claim; that said bill of particulars was
51 duly served upon the said defendant's attorneys on the 9th day of December instant, all which appears upon the calendar of the plaintiff's attorneys and is, as deponent verily believes, correct and true.

That no plea or demurrer or notice of any defense has yet been filed by the defendants' attorneys in this cause, nor served upon plaintiff's attorneys, as also appears from said calendar and as deponent verily believes to be true, and that this affidavit is made that the default of the defendants for want of such filing and service of plea, demurrer, or notice of defense by said defendants may be duly entered.

LYMAN D. NORRIS.

Subscribed and sworn to before me this 18th day of December, A. D. 1872.

HENRY P. CHURCHILL,
Notary Public, Kent Co., Mich.

52 (Indorsed:) 387. U. S. circuit court, west. dist. of Michigan. Ichabod L. Quimby vs. Oakes Ames et al. Affidavit for default. Filed Dec. 18th, 1872. Isaac H. Parrish, clerk. Norris & Blair, pl'ff's att'ys.

53 The circuit court of the United States for the western district of Michigan.

OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick Ames, Oliver Ames, 3rd,
ads.
ICHABOD L. QUIMBY.

In this cause it is stipulated that the default entered therein be and hereby is set aside without costs and without prejudice to the defendants.

Dated December 24, 1872.

NORRIS & BLAIR,
Att'y' for Quimby.

54 (Indorsed:) 387. The circuit court of the United States for the western district of Michigan. Oakes Ames et al. ads. Ichabod L. Quimby. Stipulation. Filed Dec. 23rd, 1872. Isaac H. Parrish, clerk.

55 *Plea of non-assum'sit with notice of sett-off.*

The circuit court of the United States for the western district of Michigan.

OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick Ames, Oliver Ames, 3rd, *ads.*
ICHABOD L. QUIMBY.

The defendants above named, by Hughes, O'Brien & Smiley, their attorneys, come and demand a trial of the matters set forth in the plaintiff's declaration.

HUGHES, O'BRIEN & SMILEY,
Attorneys for Defendants.

Please to take notice that the said defendants will, on the trial of this cause, insist upon and give in evidence, under the general issue above pleaded, that before and at the time of the commencement of this suit the said plaintiff was and still is indebted to the said defendants in the sum of twenty-five thousand dollars for the price and value of goods before then sold and delivered by the defendants to the plaintiff at his request; and in a like sum for the price and value of work then done and materials for the same provided by the defendants for the plaintiff at his request; and in a like sum
56 for the price and value of work then done by the defendants for the plaintiff at his request; and in a like sum for the money then lent by the defendants to the plaintiff at his request; and in a like sum for money then paid by the defendants for the plaintiff at his request; and in a like sum for money then received by the plaintiff for the use of the defendants; and in a like sum for money then found to be due from the plaintiff to the defendants on an account stated between them; and in a like sum for the use of money then due from the plaintiff to the defendants, and by the defendants forborne to the plaintiff at his request; which said several sums of money, or so much thereof as will be sufficient for that purpose, the said defendants will set off and allow to the plaintiff against any demand or demands of said plaintiff, to be proved by him on said trial, and have the balance certified in their favor.

57 You will also please take notice that the defendants will prove, under the general issue above pleaded, and insist in their defense that they did not at any time within six years next before the commencement of this suit undertake or promise in the manner and form as the said plaintiff has in his declaration alleged and complained of against them. Also that if any such articles, materials, or stock as is mentioned in the said plaintiff's bill of particulars in this cause were ever furnished to the defendants that such articles, materials, and stock were so furnished under and by virtue of a special, express contract by the terms of which such articles, materials, and stocks were to be only of first-class quality in every respect, but that the said plaintiff failed

to furnish the stock aforesaid according to such contract and agreement, and that said articles, materials, and stocks were in all respects inferior and not according to the terms of said contract and agreement of the plaintiff, on account of which said failure on the part of the plaintiff the defendants suffered great loss and damage, and the said defendants will seek to recoup and do recoup damages in this action on account of such failure on the part of said plaintiff and on account of such breach of said agreement. Dated December 24, 1872.

Yours, &c.,

HUGHES, O'BRIEN & SMILEY,
Defendants' Attorneys.

To NORRIS & BLAIR,
Plaintiff's Attorneys.

58 (Indorsed:) 387. The circuit court of the United States for the western dist. of Michigan. Oakes Ames et al. ads. Ichabod L. Quimby. Plea & notice. Received and filed December 24th, 1872. Hobart H. Chipman, clerk; by Wm. H. Van Leenwen, jr., dep't. Rece'd and filed Dec. 24th, 1872. Isaac H. Parrish, clerk.

59 UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan.

OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick Ames, and Oliver Ames, 3d, *ads.* ICHABOD L. QUIMBY.

GENTLEMEN: Please to take notice that the following is a bill of particulars of the defendants set-off in this cause, to wit:

1865.			
April 27.	To cash	834	38
" " " "		2,500	
June 27.	" "	6,000	
July 20.	" acceptance July 13, '60	1,600	
Sep. 27.	" cash	2,500	
1866.			
Jan. 31.	" "	2,500	
Feb'y 24.	" acceptance due Ap'l 1, 1866	1,666	66
M'ch 7.	" cash	2,500	
Sep. 19.	" "	2,500	
Oct. 5.	" "	400	
" 8.	" "	1,202	20
Dec. 25.	" "	1,000	
1867.			
Jan. 22.	" acceptance Jan'y 21, 60 days	5,000	
" 9.	" " 9, 30 "	5,000	
Feb. 7.	" " Feb. 1, 90 "	5,000	
" " "	" " " 4 months	5,000	
" " "	" " 11, 60 days	2,000	
M'ch 13.	" " M'ch 13, 60 "	1,687	
" 21.	" " " 21, 60 "	1,000	
Ap'l 5.	" " Ap'l 5, 60 "	1,000	
	Amount carried forward	50,890	24

60 Amount brought forward 50 890 24

Ap'l 22.	To acceptance Ap'l 22, 60 days	1,200	
May 30.	" " May 24, 60 "	600	
June 22.	" " Jun. 21, 60 "	1,300	
" 29.	" " " 27, 60 "	1,000	
July 22.	" " July 20, 60 "	1,200	
Aug. 16.	" " Aug. 9, 60 "	1,000	
" 29.	" " " 26, 60 "	2,000	
Sep. 3.	" cash paid duties and expenses on handles from Canada	286	66
Sep. 30.	" acceptance Sep. 25, 60 days	1,000	
Nov. 6.	" " Oct. 26, 60 "	767	12
" 11.	" cash	100	
" 12.	" " paid duties on handles from Canada	709	86
1868.			
Ap'l 30.	" acceptance Ap'l 24, 60 days	2,000	
June 24.	" " June 19, 60 "	1,000	
Aug. 10.	" " Aug. 3, 60 "	2,000	
Oct. 12.	" " Sep. 28, 60 "	1,000	
Nov. 10.	" cash paid duties on handles from Canada	751	43
Dec.,	" acceptance due Dec. 13, 1868	3,000	
	" cash paid freight on handles to Boston received from you as per freight bills as follows:		
1865.			
June 2.	" cash paid freight to Boston	147	
" "	" " " " " " "	147	62
" "	" " " " " " "	147	62
" 5	" " " " " " "	147	62
" "	" " " " " " "	147	59
" "	" " " " " " "	147	62
" "	" " " " " " "	147	62
" "	" " " " " " "	147	62
"	" " " " " " " "	147	62
61 June 6.	" " " " " " "	147	62
" 9.	" " " " " " "	130	52
	Amount carried forward	$73,412	00
	Amount brought forward	$73,412	00
June 12.	To cash paid freight to Boston	31	48
Aug. 15.	" " " " " " "	89	06
" "	" " " " " " "	89	07
" 12.	" " " " " " "	89	07
" "	" " " " " " "	89	07
" 18.	" " " " " " "	103	90
" 23.	" " " " " " "	30	57
Sep. 22.	" " " " " " "	1	61
" "	" " " " " " "	13	38
1866.			
June 29.	" " " " " " "	79	71
July 11.	" " " " " " "	80	13
Aug. 11.	" " " " " " "	151	44
" 13.	" " " " " " "	147	34
" 16.	" " " " " " "	215	23
" 24.	" " " " " " "	120	02
" "	" " " " " " "	120	02
" 31.	" " " " " " "	120	

Sep. 17.	" " " " " "	.....	120
" 26.	" " " " " "	.....	39 37
" 27.	" " " " " "	.....	118 13
Nov. 29.	" " " " " "	.....	126 56
1867.			
Jan. 17.	" " " " " "	.....	136 30
" 23.	" " " " " "	.....	136 30
" "	" " " " " "	.....	136 30
Feb. 27.	" " " " " "	.....	162 30
M'ch 2.	" " " " " "	.....	150 30
" 4.	" " " " " "	.....	160 30
" 9.	" " " " " "	.....	150 30
M'ch 16.	" " " " " "	.....	150 30
" 27,	" " " " " " "	.....	160 30
62 M'ch 30.	" " " " "	.....	150 30
Ap'l 8.	" " " " "	.....	130 30
" "	" " " " " "	.....	130 30
" 10.	" " " " " "	.....	130 30
" 11.	" " " " " "	.....	160 30
Amount carried forward		.....	$77,431 36
Amount brought forward		.....	77,431 36
Ap'l 19.	To cash paid freight to Boston	.....	131 10
" 27.	" " " " " "	.....	82 50
" "	" " " " " "	.....	101 25
May 25.	" " " " " "	.....	75
" "	" " " " " "	.....	118 50
Jun. 11.	" " " " " "	.....	118 50
" 20.	" " " " " "	.....	103 13
" 22.	" " " " " "	.....	140
July 3.	" " " " " "	.....	147 50
" "	" " " " " "	.....	130
" 6.	" " " " " "	.....	26
" 10.	" " " " " "	.....	141 50
" 11.	" " " " " "	.....	140
" 16.	" " " " " "	.....	130
" 26.	" " " " " "	.....	140
Ang. 3.	" " " " " "	.....	141 50
" 13.	" " " " " "	.....	130
" 21.	" " " " " "	.....	110
" 24.	" " " " " "	.....	130
" 27.	" " " " " "	.....	130
" 28.	" " " " " "	.....	185
" 29.	" " " " " "	.....	26
Sep. 7.	" " " " " "	.....	115 06
" "	" " " " " "	.....	32 63
" 14.	" " " " " "	.....	130
" 20.	" " " " " "	.....	140 30
" 21.	" " " " " " "	.....	158 50
63 Oct. 10.	To cash paid freight to Boston	.....	151 25
" 17.	" " " " " " "	.....	168 50
Nov. 9.	" " " " " "	.....	192 63
" "	" " " " " "	.....	192 63
" 14.	" " " " " "	.....	192 64

1868.			
May 7.	" " " " " "		120
" 9.	" " " " " "		139
" "	" " " " " "		26 10
	Amount carried forward		$81,768 08
	Amount brought forward		$81,768 08
June 2.	To cash paid freight to Boston		128
July 31.	" " " " " "		128
Aug. 1.	" " " " " "		128
Sep. 26.	" " " " " "		148
Nov. 3.	" " " " " "		151 85
" 5.	" " " " " "		151 25
" "	" " " " " "		151 26
" "	" " " " " "		153 07
" 24.	" " " " " "		94 53
Dec. 4.	" " " " " "		148
	" commission on advances made, as per agreement, from Dec. 25th, 1866, to Nov. 12th, 1867, @ 2½ %		946 27
	" commission for accepting drafts during year 1868, @ 2½ %		243 78
	" 66 months' storage on 681 dozen rejected handles, @ 1½c. per dozen per month		674 19
			85,014 28
	" interest on above to date		40,000 00
			$125,014 28

Dated March 11th, 1873.

Yours, &c.,

HUGHES & O'BRIEN,
Def'ts' Att'ys.

To Mesrs. NORRIS & BLAIR,
Pl'ff's Att'ys.

$83,150.04.

64 (Indorsed:) 387. United States circuit court for the western dist. of Michigan. Oakes Ames et al. ads. Ichabod L. Quimby. Bill of particulars of defendants' set-off. March 4, 1873. E. To M's'rs. Norris & Blair, pl'ff' attorneys. Hughes & O'Brien, def'ts' attorneys.

65 *Note of issue.*

STATE OF MICHIGAN:

In the circuit court of the United States, 6th circuit and west'n dist. of Mich., May 12th, A. D. 1873.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, OAKES A. Ames, Frederick L. Ames, and Oliver Ames, 3rd.

The above-entitled cause will be brought on for trial at the next term

of this court, notice having been served on the part of the plaintiff on Hughes & O'Brien, attorneys for the defendants, according to the statute and rules of this court. You will please place said cause on the issue docket of this court for said term.

NORRIS & BLAIR,
Attorneys for Plaintiff.

To the CLERK of said court.

66 (Indorsed:) 387. United States circuit court, W. D. of Mich. Ichabod L. Quimby vs. Oakes Ames et al. Note of issue. Rec'd & filed this 12th day of May, A. D. 1873. Norris & Blair, attorneys for plaintiff; , attorney for defendant.

67 UNITED STATES OF AMERICA:

The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY, PL'FF,
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick L. Ames, and Oliver Ames, 3rd, def'ts.

And now comes the said Ichabod L. Quimby, plaintiff in the above-entitled cause, by Norris and Blair, his attorneys, and demands a trial thereof by jury.

NORRIS & BLAIR,
Att'ys for Pl'ff.

68 (Indorsed:) 387. U. S. circuit court, west'n dist. of Mich. Ichabod L. Quimby vs. Oakes Ames et al. Demand for jury. Filed May 19th, 1873. Isaac H. Parrish, clerk. Norris & Blair, pl'ff's att'ys.

69 The circuit court of the United States for the western district of Michigan.

OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick Ames, and Oliver Ames, 3rd,
ads.
ICHABOD D. QUIMBY.

And now comes the said defendants by Hughes, O'Brien & Smiley, their attorneys, and demands a trial of the matters and things stated and set forth in the said plaintiff's declaration.

HUGHES, O'BRIEN & SMILEY,
Att'ys for Def'ts.

To NORRIS & BLAIR,
Pl'ff's Att'ys.

Take notice that, on the trial of this cause, the defendant will give in evidence under the general issue above pleaded, and insist in their defence, that if the said plaintiff furnished to said defendant any

shovel-handles, they were furnished under a contract or agreement dated, to wit, January 2nd, 1865, and wherein and whereby the plaintiff agreed to furnish 15,000 dozen long shovel-handles to be of the best quality of and workmanship, for the then present year, at the price of $1.25 per doz., basing the said price on the then present
70 price of gold, namely, $2.25; that it was therein and thereby agreed that if the price of gold should go up or down, that the price of said handles should be advanced or reduced accordingly, and it was agreed by said contract that no advances or reduction in the price of gold (25 per cent.) should change the price of handles unless it should remain at the advanced rates sufficiently long to effect the general price of merchandise; that the said shovel-handles furnished in pursuance of said contract were not of the best quality of timber and workmanship for that year, and that thereby the defendant sustained great damage and large quantities of said shovel-handles were entirely lost and of no value to said defendants; and the said defendants will further show that afterwards, almost immediately thereafter, the price of gold aforesaid went down a large sum of more than 25 per cent., to wit, $1.10, and remained at said reduced rate sufficiently long to effect the general price of merchandise, and remained at said reduced rate from that time to the present time and that thereby by the terms of said contract the said plaintiff was to furnish said shovel-handles at a greatly reduced price, to wit, at the sum of sixty cents per dozen, and said defendant only became liable to pay therefor the said price,
71 to wit, sixty cents per doz. for the same; that they did not comply either in quality of timber or in workmanship with the terms of said contract; and that the said plaintiff sustained great damage thereby, to wit, the sum of $5,000, which he will prove on the trial of said cause by way of recoupment and set-off, and ask to have judgement rendered in their favor; therefore you will further take notice that, on the trial of said cause, said defendants will further show under such general issue that if any shovel-handles were furnished them by the plaintiff, they were furnished under a certain other contract of date, to wit, January 27th, '66, between said plaintiff and said defendants, wherein and whereby the said contracted and agreed to furnish the defendant, at Boston, Massachusetts, immediately, on the 14th day of Oct., then commenced, 10,000 doz. of long shovel-handles of number one quality in material and manufacture and equal in all respects to a number one handle theretofore furnished by said party of the first part to the parties of the second part, that is, by the said plaintiff to the said defendants; that therein and thereby the said defendants were to have the privilege of rejecting, as they had before that time rejected, all handles which would break in the process of bending.

That the said shovel-handles were to be furnished at the price
72 and sum of $1.25 per doz. as follows: $2,500 on or before the last of January, 1866; $2,500 on or before the 24th day of March, 1866; and $1,600 on or before the 1st day of April, 1866; and the balance of said price on the due or full delivery of all of said handles.

That the said plaintiff agreed thereby to pay interest at the rate of ten per cent. on the first three payments aforesaid from the date of said respective payments until the delivery of the handles to sufficiently equal in price of said several sums, and the said defendants will show that the shovel-handles *was* delivered under said contract were not long shovel-handles of number one quality in material and manufacture and equal in all respects to number one handle before that time furnished by said plaintiff to said defendants; that they were greatly in-

ferior in quality to the other before that time furnished by said plaintiff to said defendants as number one handles; and that a large quantity of them, to wit, 10,000 doz. thereof, broke in process of bending; that they were thereby lost and of no value to the said defendants; and that, by reason thereof, they sustained great damage, to wit, $10,000, which they will claim by way of recoupment and set-off, on said trial, and ask to have judgment rendered therefor in their favor.

They will further show that the said payments mentioned in
73 said contract and hereinbefore stated were made by said defendant to the plaintiff, and that thereby he became liable to pay a large sum of money for interest at ten per cent. upon said payments from the time of said respective payments until the delivery of said handles sufficient to equal in price said several sums, which the said defendants will ask to have set off at the trial.

You will further take notice that the said defendants will show under said issue aforesaid that if any shovel-handles were furnished then by the said plaintiff, they were furnished under a certain other contract between them and said plaintiff, dated to wit, December 25th, 1856, wherein and whereby the said plaintiff agreed to make and deliver to Oliver Ames & Sons, the said defendants, 25,000 doz. four-and-a-half-feet-long handles for shovels of good quality white-ash timber, well made, and that would be suitable for good shovels, at and for the price of $1.25 per doz., and that for what handles were required and ordered by them, and forwarded to them, by the plaintiff, before April 20th, 1867, they would pay twelve and a half cents per dozen; that for any money advanced to said plaintiff, the said plaintiff was to pay the said defendants six per cent. interest, and defendants were to accept his drafts for sixty cents per doz.; and on the 25,000 doz. handles to
74 be made during the year 1867, one-third, or $5,000, at thirty days, $4,500 at sixty days, and $5,500 at ninety days' sight, making fifteen thousand dollars in all; and said defendant also agreed to allow said plaintiff to draw upon them upon said bills of lading for forty-five cents per dozen in addition to the sixty cents, difference; that therein and thereby the said Quimby was to pay the difference of two dollars and a half commission for accepting his drafts, and in settlement of the year's business the balance to be struck on the account of the plaintiff as per the said agreement; and the said defendants will show that the said handles which were furnished under said contract were not four and a half feet long, that they were not of good quality of white-ash timber, that they were not well made, and that they were not suitable for good shovels; that they were inferior in quality, and broke in bending; that thereby the defendants sustained great damage, to wit, $10,000, which they will recoup and set off on the trial of said cause, and ask to have judgment rendered therefor in their favor. That they advanced large sums of money upon said contract to said plaintiff, and that thereby he became liable to pay them six per cent. interest on such dues; that they accepted his drafts in large
75 amounts, to wit, several of said drafts in the amounts of $5,000 each, and for other large sums of money, whereby the said plaintiff became liable to pay them two and a half per cent. commission for accepting his drafts as aforesaid, in pursuance of the terms of said contract, which they will claim by way of set-off and recoupment upon said trial, and ask to have judgment rendered therefor in their favor.

HUGHES, O'BRIEN & SMILEY,
Att'ys for Def't.

76 (Indorsed:) 387. The circuit court of the United States for the western district of Mich. Oakes Ames et al. ads. Ichabod L. Quimby. Plea & notice. Filed Nov. 29, 1873. Isaac H. Parish, clerk. Hughes, O'Brien & Smiley, att'ys for def'ts.

77 The circuit court of U. S. for western district of Michigan.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. AMES, Frederick L. Ames, & Oliver Ames, 3rd.

It is hereby stipulated and agreed by the attorneys for the respective parties in the above-entitled cause that Norris, Blair & Stone be substituted in place of Norris & Blair as attorneys for plaintiff, and that on filing this stipulation with the clerk of said court an order of substitution may entered.

NORRIS & BLAIR, *Att'ys for Pl'ff.*
HUGHES, O'BRIEN & SMILEY,
Att'ys for Def'ts.

78 (Indorsed:) No. 387. U. S. cir. c't west. dist. Mich. Ichabod L. Quimby vs. Oakes Ames et al. Stipulation. Filed Nov. 11th, 1874. Isaac H. Parish, clerk. Norris & Blair, att'ys for pl'ff's.

79 The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OAKES AMES ET AL.

In this cause it is stipulated and agreed that the amended notice of recoupment and the original plea and notice may stand as and be considered as one plea.

Dated February 3d, 1875.

HUGHES, O'BRIEN & SMILEY,
Att'ys for Def't.
NORRIS & BLAIR, *Att'ys for Pl'ff.*

80 (Indorsed:) 387. United States circuit court. Ichabod L. Quimby vs. Oakes Ames et al. Stipulation. Filed February 3rd, 1875. Isaac H. Parish, clerk.

81 The circuit court of the United States, western district of Michigan.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, JR., OAKES A. AMES, Frederick Ames, & Oliver Ames, 3rd.

Assumpsit. Oct. term 1874.

Norris & Blair, att'ys for pl'ff.
Hughes, O'Brien & Smiley, att'ys for def't.

Finding by the court, April 15, 1875.

A jury was waived by written stipulation, and the cause tried by the court. Oakes Ames, who was originally a defendant, having de-

ceased, the proper suggestion was made, and by consent the cause proceeded to trial against the other defendants.

Plaintiff has for many years been engaged in the business of manufacturing shovel-handles, and has for a long time furnished large quantities annually to defendants, who are the leading shovel manufacturers in the United States. Plaintiff brings this action to recover for balances claimed against defendants for shovel-handles furnished in the years 1865, 1866, 1867, and 1868. This declaration is upon the common counts, with a bill of particulars. Defendants plead the general issue, give notice of special defenses and set-off with bill of
82 particulars. There were written contracts for the years 1865, 1866, & 1867, and in each year there were more handles delivered than called for by the contract, furnished on written or verbal orders. Plaintiff claims to recover under the common counts, on the grounds that the contracts have been fully performed on his part. The evidence shows that the transactions between the parties under the contract of 1866 has been fully settled and adjusted. Outside of the contract of 1865, which presents a question requiring the court to give it construction, there is little else in the case than to make an accounting between the parties.

The contract of 1865, being first in order of time, is that to which I give consideration for the purpose of determining its meaning and effect in the first instance. It covers most of the transactions between the parties of that year, and is in the following words:

N. EASTON, *Jan'y 2d*, 1865.

"Mr. Ichabod L. Quimby agrees to furnish us and we to take from him 15,000 dozen of long shovel-handles, to be of the best quality of t mber and workmanship, for the present year, the price to be ($1.25) one dollar and twenty-five cents per dozen, basing the price on the present price of gold, $2.25. If the price of gold goes up or down,
83 then the price of handles shall be advanced or reduced accordingly; but it is understood that no advance or reduction of the price of gold of 25 per cent. shall change the price of handles unless it shall remain at the advanced or reduced rate sufficiently long to affect the general price of merchandise.

(Signed) "I. L. QUIMBY.
"OLIVER AMES & SONS."

Plaintiff furnished and delivered the full complement of shovel handles stipulated in the contract to defendants at their place of business in North Easton, Massachusetts, and 488 dozen in excess of the requirements of the contract. 9,812 dozen were delivered May 20, 22, and 23d, when gold was 131; 1,188 dozen were delivered May 25, gold 136; and the balance, 4,488 dozen, were delivered July 29th, when gold was 145.

Plaintiff also furnished defendants 120 dozen 6-feet handles, known as telegraph spade handles, at request of defendants, at $1.75 per dozen, not affected by the contract as to price.

Defendants claim that by the terms of the contract they are liable only for 72½ cents per dozen for the handles delivered May 20 to 23rd, inclusive, when gold was $1.31; for 75½ cents per dozen for handles delivered May 25, when gold was $1.36, and for 80½ cents per dozen for handles delivered July 29th, when gold was $1.45. On the other
84 hand, plaintiff claims that the reduction in the price of gold at the time the several lots of handles were delivered having been 25 per cent. and more, the price of handles was not affected or changed

from the contract price of $1.25 per dozen, unless the reduced price of gold remained "long enough to affect the general price of merchandise," and that inasmuch as defendants have failed to show that any effect was produced on the general price of merchandise by the fall in gold, he is entitled to one dollar and twenty-five cents per dozen. Plaintiff claims that he was prepared to show on the trial, had defendants offered evidence on the subject, that the general price of merchandise was not affected by the reduction in the price of gold at the time the handles were delivered.

The standpoint for considering the contract is the time when it was made, and the rule of construction is, to determine from the language the intention of the parties. Evidently the parties did not anticipate a permanent change in the price of gold during 1865 equal to or greater than 25 per cent. While they did anticipate some fluctuation in the currency value of gold, at the same time they recognized the possibility that gold might be advanced or reduced 25 per cent. or more; they therefore provided in the contract for both contingencies
85 as affecting the price or value of handles at the time of delivery.

The price of gold was then $2.25; this was made the basis for the price of handles, at $1.25 in currency; and it was agreed that any change in the price of gold should correspondingly affect the price of handles. But it was seen that sudden and great fluctuations in the gold market, carrying the price of gold up or down, 25 per cent. or more, might seriously and injuriously affect one party or the other, unless some provision was made which would protect them alike against such possible, sudden changes. Hence there followed the provision that "no advance or reduction of the price of gold of 25 per cent. shall change the price of handles, unless it shall remain at the advance or reduced rate sufficiently long to affect the general price of merchandise."

The evidence shows that at each delivery of shovel handles under the contract the price of gold had fallen more than 25 per cent. from $2.25, the price when the contract was made.

Accordingly it is my opinion that it was incumbent on defendants to prove upon the trial that the reduction in the price of gold had at the time of delivery of the handles affected the general price of merchandise in order for them to claim a corresponding reduction in
86 the price of handles, or to reduce their price below $1.25. There being no such proof and none attempted, my opinion is the plaintiff is entitled to have $1.25 per dozen for handles. Such seems to me to be both the legal and equitable construction of the contract and the rule of evidence which controls the rights of the parties.

If, by reason of no effect having been produced upon the general price of merchandise, from the fall in the price of gold at the time the handles were delivered, the Messrs. Ames could realize for their shovels, in the manufacture of which Quimby's handles were used, the same or as good a price when gold was at $1.31 as when it was $2.25, it is not seen why they should, in view of the terms of the contract, have a reduction in the price of plaintiff's handles to 72½ cents per dozen or any other amount; whereas if a reduction of 25 per cent. or more in the price of gold had the effect to reduce the general price of merchandise, and consequently of defendant's shovels, there would be seen abundant reason why they should pay a less price for plaintiff's handles than when gold was $2.25. Exactly the reverse would be the correct view as to price of handles if an advance in the

price of gold of 25 per cent. or more had taken place and its effect was to advance the general price of merchandise.

87 On the other hand, if the upward or downward movement of the price of gold had been 25 per cent. or more, and had produced an effect upon the general price of merchandise and thereby advanced or reduced the cost of the production of handles to plaintiff, there would be seen a reason why plaintiff should have a corresponding increase or reduction in the price received for his handles.

As in my opinion such were the views held by the parties when making the contract, considered from the terms expressed therein and the subject matter involved, I have no hesitation in finding as a matter of law that plaintiff is entitled to $1.25 per dozen for shovel handles delivered under the contract of 1865.

I find that plaintiff fully performed the contract of 1865, by delivering 15,000 dozen handles of the kind and quality named therein, and 488 dozen handles in addition, all worth the contract price except 55 dozen of the 488 dozen, which were worth 50 cents per dozen.

15,433 dozen handles, at $1.25		$19,291 25
55 dozen " " 50c		27 50
		$19,318 75
120 dozen telegraph spade handles, at $1.75		210 00
		$19,528 75

88 I find defendants paid to plaintiff on account of handles in 1865 the sum of. $13,434 38

For freight on handles 2,143 90

$15,578 28

Leaving as the balance unpaid	$3,950 47
Plaintiff is entitled to interest at 6 per cent. on this balance from Janu'y 1, 1866, being 9 yrs. 3½ months, to this day, April 15, 1875	2,202 94
Due to plaintiff for handles in 1865, & interest	$6,153 41

I find defendants have paid plaintiff in full satisfaction for all handles delivered under the contract of Jan'y 27th, 1866, or otherwise in that year.

I find that a contract was made between the parties December 25, 1866, by which plaintiff was to furnish to defendants 25,000 dozen shovel handles, of good quality of white-ash timber, well made, that should be suitable for good shovels, for which defendants were to pay $1.25 per dozen, delivered at defendants' place of business in Massachusetts. For what handles defendants required and ordered before April 20, 1867, defendants were to pay $1.37½ per dozen, of which contract the following is a copy:

"N. EASTON, *Dec.* 25, 1866.

"Memorandum of agreement made this day between I. L. Quimby, of New Baltimore, Michigan, and Oliver Ames & Sons, of N. Easton, Mass.

"I. L. Quimby agrees to make and deliver to Oliver Ames & Sons twenty-five thousand dozen of 4½-feet-long handles for shovels

89 of good quality of white-ash timber, well made, and that shall

be suitable for good shovels, for which we are to pay him one dollar and twenty-five cents per dozen, and for what handles we require and order to be forwarded before Ap'l 20th, 1867, we shall pay 12½ cents per dozen extra. For advances made, we to charge Mr. Quimby six per cent. interest and accept his drafts for sixty cents per dozen on the twenty-five thousand dozen handles to be made and delivered during the year 1867; one-third, or $5,000, at 30 (thirty) days; one-third, or $5,000, at 60 (sixty) days, and one-third, or $5,000, at 90 days' sight, making $15,000 in all. We also agree to allow Mr. Quimby to draw on us, upon receipt of bills of lading, for 45 cents per dozen, in addition to the 60 cents advanced him, making 105 cents per dozen, Mr. Quimby to pay us 2½ per cent. commission for accepting his drafts; and in settlement of the year's business the balance to struck and acc't balanced as per the foregoing memorandum.

[5c. stamp.]

(Signed) "OLIVER AMES & SONS.
"I. L. QUIMBY."

I find the business of the year 1867 resulted in plaintiff's delivering to defendants, at their place of business in Massachusetts, thirty-six thousand nine hundred and twenty-four dozen shovel-handles, of which 25,000 was under the contract, the balance being on verbal or written orders.

90 I find that plaintiff fulfilled the contract on his part by delivering 25,000 dozen shovel handles, of good quality of white-ash timber, well made, and suitable for good shovels.

I find that plaintiff forwarded, prior to April 20, 1867, by order of defendants, 5,000 dozen handles, which were received by defendants, and for which, according to the contract price, plaintiff was to have one dollar and thirty-seven & a half cents, amounting to $6,850.

I find of the balance of handles delivered by plaintiff to defendants, being 31,924 dozen, one-eighth—3,990 dozen—were second quality, worth 62½ cents per dozen, amounting to $2,493.75, and that the remaining quantity, 27,934 dozen, were first quality, & worth $1.25 per dozen, amounting to the sum of $34,917.50, making the total value of all the handles delivered by plaintiff to defendants in 1867, $44,261.25.

I find that defendants paid plaintiff on account of such handles, at various times during the year 1867, the sum of	$37, 140 78
Also, they paid for plaintiff's duties	709 86
And freights	6, 095 82
Making the sum of	$43, 946 46
I find defendants entitled to have interest on advances to pl'ff, average	396 16
Also 2½ commission on $35,754.12 drafts of plaintiff on defendants, accepted by them	873 85
	$44, 216 47

91 I find a balance on the business of the year 1867, due from defendants to plaintiff, of $44.78, on which plaintiff is entitled to interest at 6 per cent. from Jan'ry 1st, 1868, to this day, April 15, 1875, being seven years three and a half months, amounting to $19.58, making the balance at this date, for the business of 1867, due plaintiff $64.36.

I find defendant accepted plaintiff's drafts during the year 1867, at

the times following, and which were duly honored and paid by them, viz:

January 9th,	acceptance	at	30	days	$5,000	
January 21st,	"	"	60	"	5,000	
February 1st,	"	"	90	"	5,000	
February 1st,	"	"	4	mos	5,000	
February 11th,	"	"	60	days	2,000	
March 13th,	"	"	60	days	1,687	
March 21st,	"	"	60	"	1,000	
April 5th,	"	"	60	"	1,000	
April 22d,	"	"	60	"	1,200	
May 24th,	"	"	60	"	600	
June 21st,	"	"	60	"	1,300	
June 27th,	"	"	60	"	1,000	
July 20th,	"	"	60	"	1,200	
August 9th,	"	"	60	"	1,000	
August 26th,	"	"	60	"	2,000	
September 25th,	"	"	60	"	1,000	
October 26th,	"	"	60	"	767 12	
					35,754 12	
Sept. 3rd, defendants also paid duties & expenses for plaintiff					286 66	
Nov. 11, they paid plaintiff cash					100 00	
92 Nov. 12, they paid for plaintiff duties					709 86	
They also paid freight on handles					6,095 82	
Add 2½ commission on $35,754.12					873 85	
Interest on advances, average					396 16	
					$44,216 47	

I find there was no contract for the business of 1868, but that plaintiff furnished to defendants at their place of business, in Massachusetts, 10,739 dozen shovel handles, of which one-eighth, or 1,342 dozen, were second quality, and worth 62½ cents per doz., amounting to $838.75.

The balance, 9,397 dozen, were first quality, worth $1.25 per dozen, amounting to	$11,746 25
Making a total sum of	$12,585 00
I find defendants paid plaintiff on account of said handles by several payments during the year	$9,000 00
Also paid duties for plaintiff	751 43
Freights	1,667 06
Making a gross sum of	$11,418 49

I find that defendants owed plaintiff at the close of the year 1868 the sum of $1,166.51; and that defendants are liable to plaintiff for interest thereon at six per cent. per annum, from January 1, 1869, to this day, April 15, 1875, being six years three and a half months, amounting to $441.34, which added to the balance found as due and owing
93 Jan'y 1st, 1869, makes one thousand six hundred and seven and $\frac{85}{100}$ dollars.

Finally, I find that plaintiff is entitled to recover and have judgment

against defendants in the sum of seven thousand eight hundred twenty-five & $\frac{62}{100}$ dollars.

Judgment will be entered according to this finding.

S. L. WITHEY,
Dist. Judge.

APRIL 15, 1875.

94 (Indorsed:) 387. The circuit court of the United States, western dist. Mich. Ichabod L. Quimby vs. Oliver Ames, jr., et al. Finding by the court. Filed April 15, 1875. Isaac H. Parrish, clerk.

95 *Orders: U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 15' day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the ninety-ninth.

Present, the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. AMES, Frederick Ames, and Oliver Ames, 3d. } No. 387.

This cause having been brought on for a hearing before the court upon stipulation waiving the jury, and court having heard the proofs and allegations of the parties and the arguments of counsel, find that the defendants did undertake and promise in manner and form as the plaintiff hath alleged in his declaration; and the court assess the plaintiff's damages over and above his costs and charges at the sum of seven thousand eight hundred and twenty-five dollars and sixty-two cents. It is thereupon considered by the court that the said plaintiff do recover against the said defendants the said sum so assessed by the court as aforesaid, together with his costs and charges to be taxed, and that he have execution therefor.

(Indorsed:) No. . United States court, western district of Michigan, southern division. Order.

96 The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, JR., OAKES A. AMES, Frederick Ames, & Oliver Ames, 3rd.

And now come the said defendants, by Hughes, O'Brien & Smiley, their attorneys, and except to the finding of the court in the following particulars, to wit:

1st. To the finding of said court that to entitle the defendants to a

reduction in the price of handles furnished in the year 1865, under the contract of Jan'y 2, 1865, corresponding with the reduction of the price of gold, it was necessary for them to prove that gold remained at the reduced price long enough to effect the general price of merchandise.

2nd. To the finding as matter of law that under the contract of 1865, Jan'y 2nd, the plaintiff was entitled to recover for handles furnished under that contract and during that year one dollar and twenty-five cents per dozen when gold was at the prices respectively of $1.31, $1.36, and $1.45, at the times, respectively, viz, May 20, 22, & 23, May 25th and July 29th, when the handles were delivered.

97 3rd. To the finding as matter of law that the plaintiff was entitled to recover interest upon unsettled yearly balances, found due by the court from the defendants to the plaintiff, to wit, interest on $3,950.47 from January 1st, 1866, to April 15th, 1875; interest on $44.78 from Jan'y 1st, 1868, to April 15th, 1875, and interest on $1,166.51 from January 1st, 1869, to April 15th, 1875.

4th. To the finding that def'ts were only entitled to $396.16 for interest upon advances for the year 1867, under the contract covering the transactions of that year.

HUGHES, O'BRIEN & SMILEY,
Att'ys for Def'ts.

98 (Indorsed:) 387. U. S. cir. ct., west. dist. of Mich. Ichabod L. Quimby vs. Oliver Ames, jr., et al. Exceptions to findings by defendants. Filed April 15, 1875. Isaac H. Parrish, clerk.

99 *Orders: U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 19th day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the ninety-ninth.

Present the honorable Solomon L. Withey, district judge. Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. Ames, Frederick Ames, and Oliver Ames, 3d.

In this cause, within two days after notice of the finding of the court, comes the said defendants, by their attorneys, Hughes, O'Brien & Smiley, and ask leave of the court to file motion for a new trial.

It is thereupon ordered that the said defendants have until the first day of the next term of this court in which to file a motion for a new trial.

(Indorsed:) No. . United States court, western district of Michigan, southern division. Order.

100 The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. AMES, FREDERICK AMES, & OLIVER AMES, 3rd.

To ISAAC H. PARRISH, *Clerk of said Court:*

SIR: Please issue a writ of error to remove this cause to the Supreme Court of the United States.

Yours, &c.,

HUGHES, O'BRIEN & SMILEY,
By E. W. WITHEY,

(Indorsed:) No. 387. July 7, 1875.

101 UNITED STATES OF AMERICA.

The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, OAKES A. AMES, FREDERICK AMES, and Oliver Ames, 2nd.

WESTERN DISTRICT OF MICHIGAN, *ss:*

M. J. Smiley, of the county of Kent, in said western district of Michigan, being duly sworn, deposes and says that he was one of the attorneys for the above-named defendants in the above-entitled cause; that after a trial of said cause, and on the 15th day of April, A. D. 1875, a judgment was rendered therein in favor of said plaintiff and against said defendants for the sum of seven thousand eight hundred & twenty-five & $\frac{62}{100}$ doll's; that on the 7th day of July, A. D. 1875, a writ of error issued to remove said cause to the Supreme Court of the United States, which was duly allowed by Hon. Solomon L. Withey, a judge of said court for the western district of Michigan.

That a citation was duly issued, allowed by said judge, and a bond, approved by said judge, was duly made and filed in said cause on the 28th day of July, A. D. 1875.

102 That said writ of error has been duly served and a copy thereof served upon Messrs. Norris, Blair & Stone, attorneys for said Quimby in said circuit court, by lodging a copy thereof in the clerk's office of said court, and that the said citation has also been duly served upon them; that the said bond was in the sum of twelve thousand dollars and that a copy thereof is hereto attached; that the clerk of said court has made return to said writ of error, by sending a transcript in said case to the clerk of the Supreme Court at Washington, and that deponent has forwarded a bond, for costs, to said plaintiffs in error, with directions to forward the same to said clerk of said Supreme Court, and that deponent verily believes that all proper measures have been taken to have said cause duly docketed in said Supreme Court, according to the rules and practice of said court.

Deponent further says that the reason said bond was not filed within

sixty days of the rendition of said judgment, is that the said plaintiffs in error resided in the State of Massachusetts, and that some time was taken in correspondence with them, upon removing said case by writ of error to said Supreme Court; that before said writ issued some time was taken by counsel and allowed by said court in which to determine the propriety of settling a bill of exceptions in said cause.

103 Deponent makes this affidavit that the said bond may be permitted to be filed and given with effect of a supersedeas, in pursuance of the statute in such case made and provided; and further says not.

M. J. SMILEY.

Subscribed & sworn to before me this 29th day of September, A. D. 1875.

HORACE TOMPKINS,
Deputy U. S. Clerk.

104 Supreme Court of the United States.

Know all men by these presents that we, Oliver Ames, Oakes A. Ames, Frederick Ames, and Oliver Ames, 2nd, as principals, and Pardan A. Gifford, as surety, are held and firmly bound unto Ichabod L. Quimby, in the sum of twelve thousand dollars, to be paid to the said Ichabod L. Quimby, his executors or administrators, for which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and we, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 7th day of July, A. D. 1875.

Whereas the above-named Oliver Ames, Oakes A. Ames, Frederick Ames, and Oliver Ames, 2nd, have prosecuted a writ of error from the Supreme Court of the United States to the circuit court of the United States for the western district of Michigan, to reverse a judgment rendered by said circuit court on the 15th day of April, A. D. 1875, in favor of said Quimby, and against said Oliver Ames, Oakes A. Ames, Frederick Ames, and Oliver Ames, 2nd:

Now, therefore, the condition of this obligation is such that if the above-named Oliver Ames, Oakes A. Ames, Frederick Ames, and Oliver Ames, 2nd, shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea,

105 then this obligation to be void; otherwise to remain in full force and virtue.

OLIVER AMES, 2ND.	[SEAL.]
OLIVER AMES.	[SEAL.]
OAKES A. AMES.	[SEAL.]
FRED. L. AMES.	[SEAL.]
PARDAN A. GIFFORD.	[SEAL.]

Approved.

S. L. WITHEY,
U. S. Dist. Judge.

106 (Indorsed:) 387. The cir. court U. S., western dist. of Michigan. Ichabod L. Quimby vs. Oliver Ames et al. Affidavit, copy of bond, &c. Filed Oct. 7th, 1875. Isaac H. Parrish, clerk.

107 The circuit court of the United States, for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, OAKES A. AMES, FREDERICK Ames, and Oliver Ames, 2nd.

In this cause, on reading the affidavit therein of M. J. Smiley, showing that a writ of error had been duly issued and served in said cause and a bond given, approved by a judge of said court, on motion of Hughes, O'Brien & Smiley, of counsel for said plaintiffs in error, it is ordered that the said bond be given and hereby is permitted to be given & with the force and effect of a supersedeas, and to stay process on the judgment in said cause, pending the determination of said writ of error, and that after the giving of said bond all process on said judgment be stayed.

DAVID DAVIS,
Justice of the Sup'e Court of the United States.

108 (Indorsed:) 387. The circuit court U. S., western dist. of Michigan. Ichabod L. Quimby vs. Oliver Ames et al. Order that bond may be given as supersedeas. Filed Oct. 7th, 1875. Isaac H. Parrish, clerk.

109 The circuit court of the United States for the 6th circuit & west. dist., Mich.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, JR., OAKES A. AMES, Frederick L. Ames, & Oliver Ames, third.

Stipulated that an order be entered in this case substituting Norris & Uhl, as the attorneys of record for the said pl'ff in place of the undersigned.

NORRIS & BLAIR,
Attorneys for the Pl'ff.

Dated APRIL 26TH, 1876.

[Same court and same case, and entitling as first above.]

Order in common-rule book.

On reading and filing the stipulation of Norris & Blair, attorneys for the pl'ff in the cause and on their motion, ordered that Norris & Uhl, be and are substituted as attorneys of record for the plaintiff herein.
Dated April 26th, 1876.

NORRIS & BLAIR,
Attorneys for the Pl'ff.

[Same court, case, and entitling as first above.]

110 The foregoing are true copies of stipulation made and order

had herein, at the date above given, and we are now the attorneys of record for the pl'ff in the said case.

NORRIS & UHL,
Attorneys for the Pl'ff.

To HUGHES, O'BRIEN & SMILEY,
Attorneys for the Def'ts.

Dated APRIL 26TH, 1876.

111 (Indorsed:) 387. U. S. cir. co. W. D. M. Quimby vs. Ames et al. Stip. Filed April 26, '76. Chester B. Hinsdill, clerk. Norris & Uhl, for pl'ff.

112 In the circuit court of the United States for the sixth circuit and western district of Michigan, southern division.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, JR.. OAKES A. AMES, FREDERICK L. Ames, and Oliver Ames, third. } April 26, 1876.

On reading and filing the stipulation of Norris & Blair, attorneys for pl't'ff in the cause, and on their motion, ordered that Norris & Uhl be and are substituted as attorneys of record for the plaintiff herein.

NORRIS & BLAIR,
Attorneys for Pl'ff.

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the western district of Michigan, greeting:

[SEAL.] Whereas lately in the circuit court of the United States for the western district of Michigan, before you or some of you, in a cause between Ichabod L. Quimby, plaintiff, and Oakes Ames, Oliver Ames, jr., Oakes A. Ames, Frederick Ames, and Oliver Ames, 3rd, defendants, wherein the judgment of the said circuit court entered in said cause on the 15th day of April, A. D. 1875, is in the following words, viz:

"The court assess the plaintiff's damages over and above his costs and charges at the sum of seven thousand eight hundred and twenty-five dollars and sixty-two cents;

"It is therefore considered by the court that the said plaintiff do recover against the said defendants the said sum so assessed by the court as aforesaid, together with his costs and charges to be taxed, and that he have execution thereof," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

114 And whereas in the present term of October, in the year of our Lord one thousand eight hundred and seventy-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel: On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is

hereby, reversed with costs, and that the said defendants recover against the said plaintiff, Ichabod L. Quimby, one hundred and seventeen dollars and twenty-three cents, for their costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to award a new trial.

7 JANUARY, 1878.

115 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the twenty-third day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

Costs of defendants: Clerk, $97.23; attorney, $20.00—$117.23.

Taxed by—

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

(Indorsed:) No. 38. No. 146. October term, 1877. Mandate. Supreme Court United States. Ames et al. v. Quimby. Filed Feb'y 3rd, 1879. Henry M. Hinsdill, clerk.

116 Supreme Court U. S., October term, 1877.

Costs of Oakes Ames et al. in No. 146.

1875, ent. ac., 56; fil. nr., 40; allow., 40; cit., 40; serv., 40; bond and app., 68; ass. of er., 40; pray., 40; rec., 100; cert., 40; doc., 40; fee bond and ent. rec., 152; m., tr., 84; Oct. term ap., 21; m., 28; pa., 80; pre., 40; ord., 28; con., 14; 1876, Oct. T. ap., 21; m., 28; ord., 28; con., 14; 1877, Oct. T. ap., 21; m., 28; rec., 40; br., 6.00; arg., 28; mo., 28; jud., 164½; fil., 40; rec. pr., 56; mo. and an., 56; mand., 5.98½; fil. pa., 40; record, 42.00; co. ap., 3.64; co., and co., 56.

	$74.02
Costs of def'ts in error	23.21
	$97.23

$97.23 fee book Q, pa. 18.

Test:

D. W. MIDDLETON,
C. S. C. U. S.

1879, Jan'y 22. Rec'd pay't per Oliver Ames & Sons.

D. W. MIDDLETON,
C. S. C. U. S.

117 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of

Grand Rapids, on the 1st day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

Present, the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES AMES, OLIVER AMES, JR., OAKES A. AMES, FREDERICK AMES, and OLIVER AMES, 3d. } No. 387.

In this cause the death of Oakes Ames and Oliver Ames having been suggested by Norris & Uhl, attorneys for the plaintiff,

Ordered, that this suit stand and be prosecuted against the defendants, Oakes A. Ames, Frederick Ames, and Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons and the cause having been called for trial, the following jury was called and sworn, to wit: Samuel W. Peterson, Willie H. Wells, D. Anderson, William H. Reynolds, Henry I. Allen, William A. Duress, Charles L. Morton, Joseph W. Hicks, Rodney W. Page, A. N. Norton, Roger W. Griswold, Jonathan Dean, jr., who sat together in the jury-box and heard the evidence this day adduced.

(Indorsed:) No. . United States court, western district of Michigan, southern division. Order.

118 The circuit court of the United States for the sixth circuit and western district of Michigan, southern division.

ICHABOD L. QUIMBY, PLAINTIFF,
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3rd, survivors of themselves and Oakes Ames and Oliver Ames, deceased, former copartners under the firm-name of Oliver Ames & Sons, defendants.

In this cause the plaintiff claims and the defendants admit the sale and delivery of certain long shovel handles; said handles having been shipped in Michigan and Canada to the said firm and received by it at North Easton, Massachusetts, as follows:

1865,	May	20th,	2,500	dozen.
"	"	22nd,	2,672	"
"	"	23,	4,640	"
"	"	25,	1,188	"
"	July	29,	4,487	"
"	"	"	120	" extra long telegraph.
In all in 1865,			15,607	dozen.

119 1866, June 9, 750 dozen long shovel handles.
" " 25, 754 " " " " "
" July 14, 750 " " " " "
" " 19, 750 " " " " "
" " 20, 750 " " " " "

"	"	25,	750	"	"	"	"
"	"	26,	750	"	"	"	"
"	Aug.	1,	750	"	"	"	"
"	"	9,	750	"	"	"	"
"	"	11,	750	"	"	"	"
"	"	14,	750	"	"	"	"
"	"	29,	750	"	"	"	"
"	Sept.	5,	1,200	"	"	"	"

Or a total of 10,204 " which it is agreed shall be reduced to 10,188 dozen. Also,

1866, November 2d, 750 dozen.
" December 20, 1,406 "
" " " 696 "
2,852 dozen.

1867,	Feb.	2,	750	"
"	"	16,	752	"
"	"	18,	750	"
"	"	20,	750	"
"	"	28,	750	"
"	March	8,	750	"
"	"	9,	750	"
"	"	11,	750	"
"	"	15,	750	"
"	"	20,	750	"
"	"	21,	750	"

(over.)

120 1867, April 6, 1,500 dozen.

	"	"	6, 600	"
"	"		13, 1,146	"
"	May		13, 750	"
"	"		29, 750	"
"	June		8, 750	"
"	"		10, 750	"
"	"		18, 750	"
"	"		24, 1,200	"
"	"		29, 750	"
"	July		1, 750	"
"	"		5, 1,000	"
"	"		9, 750	"
"	"		22, 750	"
"	"		30, 1,000	"
"	Aug.		8, 1,520	"
"	"		10, 1,200	"
"	"		17, 885	"

25,053 doz.

"	"		26, 1,251	"
"	Sept.		3, 1,000	"
"	"		5, 750	"
"	"		10, 750	"
"	"		28, 705	"
"	Oct.		2, 767	"
"	"		22, 3,091	"
"	"	"	447	"

8,761 doz., or a total from November 2d, 1866, to the last named date, October 22d, 1867, of 36,666 dozen.

121 1868. April 23, 504 dozen.
" " " " 2,000 "
" May 23, 800 "
" July 11, 850 "
" " 21, 850 "
" Sept. 10, 800 "
" " 12, 800 "
" Oct. 6, 3,747 "
" " 6, 269 "
" " 31, 555 "
" " " 68 "

Or a total in 1868 of 11,243 dozen, which it is agreed shall be reduced to 11,113 dozen'.

That the dates above given are the dates of the shipment by rail from Michigan and Canada, and the dates of receipt by defendant at North Easton, Massachusetts, are fixed at fifteen days later than the several dates of shipment.

The defendants claim and the plaintiff admits payments made on account of said handles, as shown by the attached statement at the dates there mentioned and in the sums there mentioned.

122 Payments made Ichabod L. Quimby by Oliver Ames and Sons:

1865.					
Apr.	27.	Cash balance due on 1864 acc't	834 38		
"	"	Do.	2,500 00		
June	27.	Do.	6,000 00		
July	20.	" Acceptance July 16, 60 days	1,600 00		
Sept.	27.	Cash	2,500 00		
			13,434 38		
		Cash paid freight	2,143 90		
					15,578 28
1866.					
Jan.	31.	Cash	2,500 00		
Sept.	24.	Draft due Ap'r 1, 1866	1,666 66		
M'ch	7.	Cash	2,500 00		
Sept.	19.	Do.	2,500 00		
Oct.	5.	Do.	400 00		
"	8.	Do.	1,202 20		
			10,768 86		
		Do.	1,441 39		
					12,210 25
Dec.	25.	Cash	1,000 00		
1867.					
Jan.		Acceptance Jan. 21, 60 days	5,000 00		
		Do. Feb. 1, 90 days	6,000 00		
		Do. Jan. 9, 30 "	5,000 00		
		Do. Feb. 11, 60 "	2,000 00		
		Do. Feb. 1, 4 mo's	5,000 00		
		Do. M'ch 13, 60 days	1,687 00		
		Do. Ap'r 5, 60 "	1,000 00		

		Do.	"	22, 60	"	1,200 00	
		Do.	M'ch	21, 60	"	1,000 00	
		Do.	May	24, 60	"	600 00	
		Do.	June	21, 60	"	1,300 00	
		Do.	"	27, 60	"	1,000 00	
		Do.	July	20, 60	"	1,200 00	
		"	Aug.	9, 60	"	1,000 00	
123		Do.	Aug.	26, 60 days		2,000 00	
	Sept. 3.	Cash, duties, & expenses				286 66	
		Acceptance	Sep.	25, 60 days		1,000 00	
		"	Oct.	26, 60 "		767 12	
Nov.	11.	Cash				100 00	
	12.	Do. duties				709 86	
						37,850 64	
		Do. freight				6,095 82	
							43,946 46
1868.							
Apr.	30.	Acceptance	Apr.	24, 60 days		2,000 00	
June	24.	Do.	June	19, 60 "		1,000 00	
Aug.	10.	Do.	Aug.	3, 60 "		2,000 00	
Oct.	12.	Do.	Sep.	28, 60 "		1,000 00	
Nov.	10.	Cash paid duties				751 43	
		Acceptance due Dec. 10–13				3,000 00	
						9,751 43	
		Cash paid freight				1,667 06	
							11,418 49
							83,153 48

The question of the quality of the handles delivered as aforesaid and all other questions of fact not stipulated are left open to the jury and for other and further evidence.

April 1st, 1879.

NORRIS & UHL,
Attorneys for Pl'ff.
HUGHES, O'BRIEN & SMILEY,
Att'ys for Def'ts.

124 (Indorsed:) No. 387. The circuit court for the United States for the 6th circuit & western district of Michigan, S. D. Ichabod L. Quimby vs. Oliver Ames, 3d, et. al. Stipulation. Filed April 2d, 1879. H. M. Hinsdill, cl'k cir. c't. Norris & Uhl, pl'ffs att'ys. Hughes, O'Brien & Smiley, def'ts att'ys.

125 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District, Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 2' day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

Present, the honorable Solomon L. Withey, district judge.

130 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 10 day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

Present, the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3d, survivors of themselves and Oakes Ames, and Oliver Ames, deceased, co-partners under the firm-name of Oliver Ames and Sons. } No. 387.

The jury heretofore empanneled in this cause sat together in the jury-box and heard the arguments of counsel this day adduced.

(Indorsed;) No. . United States court, western district of Michigan, southern division. Order.

131 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 11th day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

Present, the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons. } No. 387.

The jury heretofore empanneled in this cause sat together in the jury-box, and heard the arguments of counsel, and, after listening to the charge of the court, retired in charge of an officer of the court duly sworn to attend them, and after being absent for a time returned into court, and say upon their oaths that the said defendants did undertake and promise in manner and form as the plaintiff has alleged in his declaration, and assess the damages of the said plaintiff at the sum of twelve thousand eight hundred sixteen and $\frac{53}{100}$ dollars ($12,816.53) over and above his costs and charges.

On application, ordered that defendants have sixty days in
132 which to move for a new trial, prepare and file bill of exceptions, with stay of proceedings in the mean time except as to taxation of costs.

(Indorsed:) No. . United States court, western district of Michigan, southern division. Order.

133 The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, 2ND, FREDERICK L. AMES, Oakes A. Ames, survivors of themselves and Oakes Ames and Oliver Ames, deceased.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Oakes A. Ames, of North Easton, in the State of Massachusetts, being duly sworn, deposes and says that he is one of the defendants in the above-entitled cause; that his deposition was once taken therein; that he knows the plaintiff, Ichabod L. Quimby; that he is informed and believes that on the trial of said cause, which took place about the twelfth day of April, inst., the said Quimby testified in substance that the contract between the parties dated January 2nd, 1865, and known as the gold contract, was executed upon Sunday.

This deponent further says that he well remembers the said contract and its execution, and the circumstances which led to its execution; that at the time said contract was executed said Quimby was at
134 North Easton, and previous to that time the said plaintiff had been furnishing the defendants with shovel-handles, and was then talking about furnishing them more; that said Quimby kept talking about the price of gold, claiming that it was going up to a high figure, and was unwilling to contract upon the basis of the then currency, but wanted to make a contract based upon the price of gold.

That after considerable negotiation the said defendants consented thereto, and the said gold contract, dated January 2nd, 1865, was made and executed. Oliver Ames, 2nd, wrote the contract and signed it on behalf of the defendants, and said Quimby signed it; that deponent saw Quimby sign said contract, and knows that it was not Sunday when he, said Quimby, signed it; that Oliver Ames and Oakes Ames (now both deceased) were present as well as Frederick L. Ames; that deponent well remembers that said contract was executed in the evening, and when they were all present, and upon a business day, and not upon Sunday.

Deponent further says that they, the defendants, never transacted business on Sunday, and deponent remembers that the said contract was made on a regular business day, when all the partners were present, in the regular and week-day transaction of their business.

OAKES A. AMES.

135 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

I, Samuel Jennison, a commissioner of the State of Michigan, residing in Boston, duly commissioned and qualified by the governor and

under the laws of said State to take affidavits, &c., &c., to be used or recorded therein, do certify that on this thirtieth day of April, A. D. 1879, personally appeared before me in said Boston the above-named Oakes A. Ames, and subscribed and swore to the foregoing affidavit.

In witness whereof I hereto set my hand and official seal the day and year aforesaid.

SAMUEL JENNISON,
Commissioner for Michigan in Boston.

U. S. AMERICA,
District of Massachusetts:

MAY 8TH, A. D. 1879.

Then personally appeared the said Oakes A. Ames and made oath to the truth of the foregoing affidavit by him subscribed, before me.

ELIAS MERWIN,
U. S. Commissioner for the U. S. Circuit Court
For East'n District.

136 (Indorsed:) No. 387. U. S. circuit court, west. dist. of Mich., southern division. Ichabod L. Quimby vs. Oliver Ames, 2nd, et al. Affidavit of Oakes A. Ames. Filed May 12th, 1879. Henry M. Hinsdill, clerk.

137 The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, 2ND, FREDERICK L. AMES, Oakes A. Ames, survivors of themselves and Oliver Ames and Oakes Ames, deceased.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Oliver Ames, 2nd, being duly sworn, deposes and says that he is one of the defendants in the above-entitled cause, and attended the last trial thereof as a witness and in behalf of said defendants; that the depositions of said other living defendants had been taken in said cause; that on said trial this deponent was taken greatly by surprise by the testimony of said Quimby that the contract of date January 2nd, A. D. 1865, and known as the gold contract, was signed on Sunday; that thereupon this defendant, knowing that Frederick L. Ames was an important witness for the defense, telegraphed him to come on as a witness at once, and that thereupon said Frederick Ames came on immediately, and by travelling on Sunday reached Grand Rapids
138 in time to testify as a witness; that deponent did not know that the defendant Oakes A. Ames was an important or material witness in said cause, upon said subject of said alleged Sunday contract, until he returned home to North Easton after said trial and learned from said Oakes A. Ames that he was such witness and distinctly remembered all about said transaction and the execution of said contract.

Deponent further says that on the first trial of said cause the execution of said contract was not disputed, nor was its validity questioned, and defendants never had any intimation that it would be upon the

next trial until he heard said Quimby testify, near the close of said trial, that it was signed on Sunday, and that this deponent was thereby greatly taken by surprise; and deponent again says that the said contract was not made upon Sunday, but upon a week-day.

OLIVER AMES.

Subscribed and sworn to before me, May 1st, 1879.

J. M. DEUEL,
U. S. Comm's'r S. D. of N. Y.

139 (Indorsed:) No. 387. U. S. circuit court, west. dist. of Mich., southern division. Ichabod L. Quimby vs. Oliver Ames, 2d, et al. Affidavit of Oliver Ames, 2nd. Filed May 12th, 1879. Henry M. Hinsdill, clerk.

140 UNITED STATES OF AMERICA:

The circuit court of the United States for western district of Michigan, southern division.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, 2ND, FREDERICK L. AMES, Oakes A. Ames, survivors of themselves and Oliver Ames and Oakes Ames, deceased. } May 12th, A. D. 1879.

And now comes the said defendants, by Hughes, O'Brien & Smiley, their attorneys, and moves the court now here to set aside the verdict and grant a new trial in said cause upon the following grounds and for the following reasons:

The said verdict is against the law and evidence in the case.

The verdict is against and contrary to the great preponderance and weight of the evidence in the case.

The verdict is excessive, and so grossly so as to indicate misconduct in the jury and a total disregard of the rights of the parties.

The court erred in admitting testimony against the objection of the defendants' counsel on the trial of the cause.

The court erred in overruling the objection made to the ad-
141 mission of the testimony of the witness Simeon Staples.

The court erred in his instructions to the jury, in modifying the requests to charge made by the defendants' counsel.

In charging, as requested by the plaintiff's counsel, upon the subject of the signing of the gold contract.

In charging the jury upon his own motion.

And for the further reason of additional and newly-discovered testimony, as shown by the affidavits on file, copies of which are served.

And for the further reason that the defendants were taken by surprise at the testimony of the plaintiff that the contract of January 2nd, 1865, was executed on Sunday, and not prepared to meet said statement immediately, but upon reasonable time and upon a new trial could fully meet said testimony, as shown by affidavits on file.

This motion will be based on the files and records in said cause, the proceedings on the trial, and the affidavits of Oakes A. Ames and Oliver Ames, 2nd, on file, copies of which are served with this motion.

HUGHES, O'BRIEN & SMILEY,
Def'ts' Att'ys.

142 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 10 day of June, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

Present the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons. } No. 387.

In this cause, on application, ordered that the time heretofore given defendants in which to move for a new trial and prepare and file bill of exceptions be and the same hereby is extended 30 days.

(Indorsed:) No. United States court, western district of Michigan southern division. Order.

143 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 8 day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and fourth.

Present the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons. } No. 387.

This cause came on to be heard on motion for a new trial, and the court heard the arguments of counsel, and took the same into consideration.

(Indorsed:) No. . United States court, western district of Michigan, southern division. Order.

144 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 18 day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and fourth.

Present the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons.

In this cause the motion for a new trial having been argued and submitted, and the court having had due deliberation thereon,

Ordered that the said motion be, and the same is hereby, overruled with costs, including an attorney fee of ten dollars.

(Indorsed:) No. . United States court, western district of Michigan, southern division. Order.

145 *Orders.—U. S. court.*

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 31 day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and fourth.

Present the honorable Solomon L. Withey, district judge.

Among the proceedings then and there had were the following, to wit:

ICHABOD L. QUIMBY
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3d, survivors of themselves and Oakes Ames and Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons. } No. 387.

The jury by whom the issue joined in this cause was tried, having on the 11th day of April, 1879, rendered a verdict therein in favor of the plaintiff and against the defendants, and having assessed the damages of the said plaintiff on occasion of the premises at the sum of twelve thousand eight hundred and sixteen and $\frac{53}{100}$ dollars over and above his costs and charges by him about his suit in that behalf expended, and an order having been entered in said cause, on motion of said defendants, staying the proceedings therein to enable said defendants to move

for a new trial in said cause, and said motion having been made,
146 heard, and denied, and said stay of proceedings having expired:

Therefore, it is considered that the said plaintiff do recover against the said defendants his damages, by the jurors aforesaid in form aforesaid assessed, and the interest thereon, at six per cent. per annum from the rendition of the said verdict, together with his costs and charges aforesaid to be taxed.

(Indorsed: No. . United States court, western district of Michigan, southern division. Order.

147 UNITED STATES OF AMERICA:

The circuit court of the United States for the western district of Michigan.

ICHABOD L. QUIMBY
vs.
OLIVER AMES, 2ND, OAKES A. AMES, FREDERICK L. Ames, survivors of themselves and Oliver Ames and Oakes Ames, deceased.

In this cause the issue joined between the parties came on to be tried on the 1st day of April, A. D. 1879, before honorable Solomon L. Withey, district judge of the western district of Michigan, presiding. And now come the said plaintiff and the defendants, by their respective counsel, ready for trial, and the jurors of the jury being called likewise come, and after being elected, tried, and sworn to try the said issues, the counsel for the plaintiff, to maintain and prove the issues on his part, introduced and read in evidence a stipulation, in the words and figures following, to wit:

The circuit court of the United States for the sixth circuit and western district of Michigan, southern division.

148 ICHABOD L. QUIMBY, PLAINTIFF,
vs.
OAKES A. AMES, FREDERICK L. AMES, AND Oliver Ames, 3rd, survivors of themselves and Oakes Ames and Oliver Ames, deceased, former copartners under the firm-name of Oliver Ames & Sons, defendants.

In this cause the plaintiff claims and the defendants admit the sale and delivery of certain long shovel handles, said handles having been shipped in Michigan and Canada to the said firm and received by it at North Easton, Massachusetts, as follows:

1865.	May	20th.	2,500 dozen.	
"	"	22.	2,672 "	
"	"	23.	4,640 "	
"	"	25.	1,188 "	
"	July	29.	4,487 "	
"	"	29.	120 "	extra long telegraph.
In all, 1865, in			15,607.	

1866.	June	9.	750	dozen	long	shovel	handles.	
"	"	25.	754	"	"	"	"	
"	July	14.	750	"	"	"	"	
"	"	19.	750	"	"	"	"	
"	"	20.	750	"	"	"	"	
"	"	25.	750	"	"	"	"	
"	"	26.	750	"	"	"	"	
"	Aug.	1.	750	"	"	"	"	
	"	"	9.	750	"	"	"	"
149 1866.	Aug.	11.	760	"	"	"	"	
	"	"	14.	750	"	"	"	"
"	"	29.	750	"	"	"	"	
"	Sept.	5.	1,200	"	"	"	"	
or a total of			10,204	"	, which it is agreed shall be reduced to 10,188 dozen.			

Also,

1866.	November	2nd,	750	dozen.		
"	December	20th,	1,406	"		
"	"	"	696	"		
					2,852 doz.	
1867.	Feb'y	2.	750	"		
"	"	16.	752	"		
"	"	18.	750	"		
"	"	20.	750	"		
"	"	28.	750	"		
"	March	8.	750	"		
"	"	9.	750	"		
"	"	11.	750	"		
"	"	15.	750	"		
"	"	20.	750	"		
"	"	21.	750	"		
"	April	6.	1,500	"		
"	"	6.	600	"		
"	"	13.	1,146	"		
"	May	13.	750	"		
"	"	29.	750	"		
"	June	8.	750	"		
"	"	10.	750	"		
"	"	18.	750	"		
"	"	24.	1,200	"		
	"	" 29.	750	"		
150 1867.	July	1.	750	dozen.		
	"	" 5.	1,000	"		
"	"	9.	750	"		
"	"	22.	750	"		
"	"	30.	1,000	"		
"	Aug.	8.	1,520	"	Canada.	
"	"	10.	1,200	"		
"	"	17.	885	"		
					25,053 doz.	
"	"	26.	1,250	"		
"	Sept.	3.	1,000	"		
"	"	5.	750	"		
"	"	10.	750	"		
"	"	28.	705	"		

"	Oct.	2.	767	"	
"	"	22.	3,091	"	Canada.
"	"	"	447	"	do.
					8,761 doz.

Or a total from November 2d, 1866, to the last-named date, October 22d, 1867, of 36,666 dozen.

1868.	April	23.	504	dozen.	
"	"	"	2,000	"	
"	May	23.	800	"	
"	July	11.	850	"	
"	"	21.	850	"	
"	Sept.	10.	800	"	
"	"	12.	800	"	
"	Oct.	6.	3,747	"	Canada.
"	"	6.	267	"	do.
"	"	31.	555	"	
"	"	31.	68	"	

or a total in 1868 of 11,243 dozen, which it is agreed shall be reduced to 11,113 dozen. That the dates above given are the dates
151 of the shipment by rail from Michigan and Canada, and the dates of receipt by defendants, at North Easton, Massachusetts, are fixed at fifteen days later than the several dates of shipment.

The defendants claim and the plaintiff admits payments made on account of said handles, as shown by the attached statement, at the dates there mentioned and in the sums there mentioned.

PAYMENTS MADE ICHABOD L. QUIMBY BY OLIVER AMES & SONS.

1865.				
Apr. 27.	Cash balance due on 1864 acc't		834 38	
" "	Do.		2,500 00	
June 27.	Do.		6,000 00	
July 20.	Acceptance, July 13—60 days		1,600 00	
Sept. 27.	Cash		2,500 00	
			13,434 38	
	Cash paid freight		2,143 90	
				15,578 28
1866.				
Jan. 31.	Cash		2,500 00	
Feb. 24.	Draft due April 1, 1866		1,666 66	
Mar. 7.	Cash		2,500 00	
Sept. 19.	Do.		2,500 00	
Oct. 5.	Do.		400 00	
8.	Do.		1,202 20	
			10,768 86	
	Do. paid freight		1,441 39	
				12,210 25
Dec. 25.	Cash		1,000 00	
1867.				
Jan.	Acceptance, Jan.	21—60 days	5,000 00	
	Do. Feb.	1—90 "	5,000 00	
	Do. Jan.	9—30 "	5,000 00	

	Do.	Feb. 11—60 "	2,000 00		
	Do.	" 1— 4 mos	5,000 00		
	Do.	M'rch 13—60 days	1,687 00		
	Do.	Ap'l 5—69 "	1,000 00		
	Do.	" 22—60 "	1,200 00		
	Do.	M'rch 21—60 "	1,000 00		
	Do.	May 24—60 "	600 00		
	Do.	June 21—60 "	1,300 00		
	Do.	" 27—60 "	1,000 00		
	Do.	July 20—60 "	1,200 00		
	Do.	Aug. 9—60 "	1,000 00		
	Do.	" 26—60 "	2,000 00		
Sept. 3.	Cash, duties & expenses		286 66		
	Acceptance, Sept. 25—60 "		1,000 00		
	Do.	Oct. 26—60 "	767 12		
152	Nov. 11. Cash		100 00		
	" 12. Do. duties		709 86		
			37,850 64		
	" freight		6,095 82		
				43,946	46
1868.					
Apr. 30.	Acceptance, Apr. 24—60 days		2,000 00		
June 24.	Do.	June 19—60 "	1,000 00		
Aug. 10.	Do.	Aug. 3—60 "	2,000 00		
Oct. 12.	Do.	Sept. 28—60 "	1,000 00		
Nov. 10.	Cash paid duties		751 43		
	Acceptance, due Dec. 10–13		3,000 00		
			9,751 43		
	Cash paid freight		1,667 06		
				11,418	49
				83,153	48

The question of the quality of the handles, delivered as aforesaid, and all other questions of fact not stipulated, are left open to the jury and for other and further evidence.

April 1st, 1879.

NORRIS & UHL,
Attorneys for Plaintiff.
HUGHES, O'BRIEN & SMILEY,
Att'ys for Def'ts.

And thereupon the plaintiff, to further maintain and prove the issue on his part, introduced as a witness the plaintiff, ICHABOD L. QUIMBY, who, being duly sworn, gave evidence in substance as follows:

I reside in this city; commenced furnishing handles to defendants in 1854 and continued until 1868; handles were made from white ash, best quality, 4½ feet long. I have been in the business about thirty years. Handles were worth $1.25 per dozen in 1865. I shipped in 1865 about
120 doz. extra-long handles, worth $1.75 per doz.; that was their
153 value in Massachusetts. In 1866, up to Sept. 6th, I shipped
them 10,188 doz., mentioned in the stipulation, long handles, worth $1.25 per dozen. I had a written agreement for the handles for the first part of 1866. This contract did not cover all the handles of

1866; did not cover the November and December shipments. They were worth $1.37½ per doz. I had an agreement outside the written agreement for them at that price. This verbal contract was with the defendants; talked over with Oliver Ames, Oakes Ames, and Oliver Ames, jr. They wanted a quantity of handles Nov., 1866. I was to receive $1.37½ per dozen for them. My orders were to ship forward as fast as I could. The contract was made Oct. 8th, 1866, and run until navigation opened, which was 20th April, 1867. After April 20th prices were to be $1.25 per dozen. I graded the handles as No. 1 & 2, and tied one dozen in a bundle.

In 1868 the 11,113 doz. delivered were worth, No. 1 handles, $1.25 per doz., and No. 2 half price. From Nov. 2nd, 1866, up to the close of 1867, I delivered 36,666 doz. handles. They were worth up to April 20th, 1867, $1.37½ per doz., and after that $1.25 per doz. Of the handles mentioned in the stipulation there were about 1,480 doz. of No. 2 so billed and sorted.

Upon cross-examination by the defendant's counsel, the witness testified in substance as follows:

154 There was a contract in writing signed by the parties for the year 1865 for 15,000 dozen handles. First shipment was May 20th, 1865. (The contract was here shown the witness, and he identified it. Said contract was offered and read in evidence by the defendant under objection by plaintiff's counsel that it was irrelevant and immaterial, and read as follows:)

NORTH EASTON, *Jan'y 2nd*, 1865.

Mr. Ichabod L. Quimby agrees to furnish us, and we to take from him, 15,000 doz. of long shovel-handles, to be of best quality of timber and workmanship, for the present year the price to be ($1.25) one dollar and twenty-five cents per dozen, basing the price on the present price of gold, $2.25. If the price of gold goes up or down, then the price of handles shall be advanced or reduced accordingly.

But it is understood that no advance or reduction of the price of gold of 25 per cent. shall change the price of handles, unless it shall remain at the advanced or reduced rate sufficiently long to affect the general price of merchandise.

I. L. QUIMBY.
OLIVER AMES & SONS.

[Int.-rev. stamp, 5 cents.]

And thereupon the witness further testified that he also had a contract for 1866, dated January 27th, 1866, which governed the operations of the parties during part of that year. Said contract was

155 thereupon shown the witness, and he identified it, and thereupon it was offered and read in evidence by the defendants, and said contract is in the words and figures following, viz:

Memorandum of agreement made in duplicate this twenty-seventh day of January, A. D. 1866, between Ichabod L. Quimby, of New Baltimore, Macomb County, Michigan, party of the first part, and O. Ames & Sons, of North Easton, Mass., parties of the second part, witnesseth: In consideration of the promises and agreements hereinafter set forth, the said party of the first part agrees to and with the parties of the second part, that he will make, sell, and deliver in the city of Boston, Mass., to the said parties of the second part, on or before the first day of October next, ten thousand dozen long shovel-handles of No. 1, one

quality in material and manufacture, and equal in all respects to the No. one handles heretofore furnished by said party of the first part to the parties of the second part, the latter to have the privilege of rejecting as heretofore all handles which break in the process of bending.

And the said parties of the second part, in consideration of the premises, agree to and with the party of the first part to buy and receive the said handles and to pay him for the same one dollar and twenty-five ($1.25) per dozen, as follows: Twenty-five hundred dollars
156 ($2,500) on or before the last day of January instant; twenty-five hundred dollars ($2,500) on or before the first day of March next, and one thousand six hundred and sixty-six and $\frac{67}{100}$ dollars ($1,666.67) on or before the first day of April next, and the balance of said price on the due and full delivery of all of said handles.

The first three payments above are to be made at the office of George V. N. Lothrop, in the city of Detroit, Michigan; and the said party of the first part agrees to pay interest at the rate of ten per cent. thereon from the date of the respective payments until the delivery of handles sufficient to equal in price said several sums.

This contract is subject to the condition, that it is not to take effect until Gilbert Hathaway, esq., shall duly guarantee the performance of the same by the party of the first part, to the extent of money to be advanced in the three first payments above provided.

Detroit, Jan'y 27th, 1866.

O. AMES & SONS,
By GEO. V. N. LOTHROP,
Agent and Attorney.
I. L. QUIMBY.

[Int. rev. stamp, five cents.]

In consideration that the said O. Ames & Sons, of North Easton, Mass., will enter into the above contract with Ichabod L. Quimby, of New Baltimore, Mich., I, Gilbert Hathaway, of New Baltimore
157 aforesaid, do hereby undertake and guarantee to the said O. Ames & Sons the due and full performance of said contract by said Quimby, to the extent and amount of the money to be advanced and paid to said Quimby in said first three payments, and interest thereon.

Detroit, Jan'y 27th, 1866.

GILBERT HATHAWAY.

[Int. rev. stamp, 5 cts.]

And the said witness further testified that he had a contract dated December 25th, 1866, which governed the operations between the parties for the year 1867. The said contract was shown to the witness and identified by him and introduced and read in evidence by the defendants. The said contract was in the words and figures following, viz:

N. EASTON, *Dec. 25th*, 1866.

Memorandum of agreement made this day between I. L. Quimby, of New Baltimore, Michigan, and Oliver Ames & Sons, of N. Easton, Mass. I. L. Quimby agrees to make and deliver to Oliver Ames & Sons twenty-five thousand dozen of 4½-feet long handles for shovels, of good quality white-ash timber, well made, and that shall be suitable for good shovels, for which we are to pay him one dollar and twenty-five cents per dozen, and for what handles we require and order to be forwarded before April 20th, 1867, we shall pay 12½ cents per dozen extra.

158 For advances made we to charge Mr. Quimby six per cent. interest and accept his drafts for sixty cents per dozen on the twenty-five thousand dozen handles to be made and delivered during the year 1867. One-third or $5,000 at thirty days', one-third or $5,000 at 60 days', and one-third or $5,000 at 90 days' sight, making $15,000 in all. We also agree to allow Mr. Quimby to draw on us upon receipt of bills of lading for 45 cents per doz. in addition to the 60 cents advanced him, making 105 cents per dozen. Mr. Quimby to pay us 2½ per cent. commission for accepting his drafts, and in settlement of the year's business the balance to struck and ac't balanced as per the foregoing memorandum.

OLIVER AMES & SONS,
I. L. QUIMBY.

[Int. rev. stamp, 5 cents.]

The witness further testified that he did not recollect any poor handles in 1865. There was a pile of some 55 dozen they said broke in bending, Defendants showed me some of them which they claim broke in the process of bending. I objected to allow anything for these broken handles. I said to them I wanted them to make a test of the handles before they put them into their bending-mould.

In 1866 the defendants made a statement of the account and handed it to witness, which he approved, except the broken handles.

159 I considered that contract for 1866 settled, except the broken handles, which they wished to charge back, and I refused, as they did not belong to that lot.

Some handles will break in bending. They had the largest portion of the handles on hand and had not bent them, hence I would not allow what they claimed—some 172 dozen. I offered to allow 72 dozen. I testified on the last trial that I accepted a check for $1,202.20 in settlement of that year, and could not settle for the year 1865.

Defendants paid me $125, by payment of my draft in Nov. after; so that up to Oct. 8 I considered that contract settled.

December 25th, 1867, I had a verbal order for 20,000 dozen, to be shipped prior to April 20th, but I could not ship so many.

Under the 1867 written contract I shipped 25,000 dozen. The first shipment under it was Feb'y 2nd, 1867, as I understood it. Feb. 22nd, 1867, defendants gave orders for 40,000 dozen.

In 1868 I furnished handles under a verbal contract.

On redirect examination the witness says the contract of December 25th, 1866, was made for the business of 1867. I had a duplicate of it, which was destroyed by fire. The copy introduced is not an exact copy of the one I had in its reference to the 2½ per cent. commissions.

160 The one I had was made by Oliver Ames, 2nd. Drafts for handles shipped I was to pay no commission on; those for advances before shipments I was to pay commissions on.

Ques. What change was made in the duplicate which you had?

This question was objected to by the defendants' counsel on the ground that it is incompetent and irrelevant, and there having been no denial of the execution of this contract, as plead and given notice of by defendants, it is incompetent to vary it by parol.

This objection was overruled by the court, and the defendants' counsel excepted to said ruling and decision. And the witness answered, the word "advanced" was inserted after the word drafts and before the word "and" near the close of the contract. I have not seen my copy since 1872 or 1873; there was but a change of one word.

From the fall of 1866, Nov. 2nd to April 20th, 1867, the price of all handles delivered should be $1.37½ cents per dozen.

Thereupon the defendants' counsel exhibited the bill of particulars which the plaintiff's counsel had served upon them, and called the attention of the court to the fact that he only claims in his bill of particulars that the handles delivered prior to April 1st, 1867, are to be charged at $1.37½, and that the items of April 6th, 1,500 doz., April 6th, 600 doz., and April 13th, 1,140, are only charged at $1.25 per
161 dozen, and claimed that the plaintiff could only be entitled to 1.37½ per doz. for those charged in the bill of particulars furnished at that sum. The plaintiff's counsel claimed that the bill of particulars contained a mistake in that respect.

The witness then continued: I have no written order for more than 5,000 dozen prior to April 20th, 1867. I shipped on a verbal order. When I was in North Easton my attention was called to a lot of small handles; this was in 1867; some were small; I said I was willing to let them go for No. 2. They were included in 1,400 dozen which I told the bookkeeper he might enter as No. 2.

And thereupon the said plaintiff rested his case.

And thereupon the defendants, to maintain and prove the issue on their part, called as a witness one of the defendants, OLIVER AMES, 2ND, who gave evidence substantially as follows:

The defendants bought handles of the plaintiff in 1865, 1866, 1867, and 1868, under the three contracts which have been introduced in evidence. I wrote and signed the contract of Jan. 2nd, 1865, and saw the plaintiff sign it. The handles of 1865 were bought and furnished under it. The contract for 1866 was drawn by Mr. Lothrop, the preliminaries being arranged by my father.

The contract for 1867, dated Dec. 25th, 1866, was drawn by my father. The handles of 1867 and 1868 were furnished under it,
162 the additional amount being ordered verbally. I never made the change in that contract referred to by Quimby in his testimony.

In 1865 there were 55 dozen which broke in the process of bending. In 1866 there were 172 dozen which broke in the process of bending. In 1867 and 1868 the handles were much poorer than they had previously been; they were small and too light for shovel-handles. The timber was poor and they broke in bending. We always had a custom with all our customers, including plaintiff, that when a handle broke in bending we charged it back to the person furnishing it. We had dealt with the plaintiff prior to 1865, and settled always on that basis with him.

In 1867 the shopmen complained of the handles. I called plaintiff's attention to it, and he promised to do better, but he kept on getting worse and worse. In 1867–'8 one-quarter of the handles which he sent us for first quality were only fit for second quality; there were about 1,700 dozen worthless.

Under the last contract we only ordered 5,000 dozen at the extra price of $1.37½ per dozen.

He shipped us some Canada handles and we paid the duties for him.

I gave my personal attention to the business from 1854 to 1868. My business was mostly in the shops. I went to the shop in the morning and stayed all day. Mr. Kennedy did the office work. The
163 members of the firm were in the offices generally in the evening.

We had business interviews with the plaintiff at the office in the evening. He was there three or four times a year. The contract of

Dec., 1866, was drawn by my father. The contract of 1865 I made; it was made in the evening; my father was present and my uncle Oliver Ames and Quimby.

The defendants, further to maintain the issue on their part, introduced as a witness GEORGE W. KENNEDY, who testified that he was bookkeeper for the defendants for 16 years. They kept an account of broken handles, and charged them back to plaintiff, and settled with him on that basis; that was the custom. In 1866 there were 172 dozen; in 1865, 55 dozen. Mr. Quimby was not in the office on Oct. 8. We figured on the account up to that time, and gave him a check for that year's balance; charged him interest $309.75, and gave him a check for the balance, $1,202.20, in settlement for that year.

The operations of 1865 for that year were not settled. We wanted to settle by the contract, and he wanted a higher price. Gold had declined.

We received 9,812 doz. when gold was $1.37, handles 76 cts.
" " 1,188 " " " " 1.38, " 77½ "
" " 4,488 " " " " 1.43, " 79 "

In 1867 defendants accepted Quimby's drafts to the amount of about $35,754.12.

In 1867 there were 5,776 dozen refuse handles charged to him.

164 In 1868 there was a large number of handles charged back to him, 1,297 dozen.

The defendants, further to maintain and prove the issue on their part, called as a witness one HORACE PERKINS, who testified, among other things, that he resided at New Baltimore, Michigan; was a shovel-handle maker and had been for several years, and sold to defendants and others in Massachusetts; that he was acquainted with the market value of shovel-handles in Massachusetts in 1868, and that such price was $1.20 per dozen for first quality, and 60 cents for second quality.

The defendants then introduced in evidence the depositions of Michael Butler and thirteen other witnesses, tending to show that the quality of the handles furnished defendants by the plaintiff in 1867 and 1868 was bad, and that a large proportion of them broke in the process of bending.

The defendants also proved that gold declined after the contract of 1865 was made, so that at the times the handles of 1865 were delivered gold was at the prices named by the witness Kennedy.

And thereupon the defendants rested their defense.

165 Thereupon the plaintiff, to maintain and prove the issue on his part, offered the deposition of SIMEON STAPLES, who testified that he was in the employ of the Old Colony Company, and that the plaintiff furnished the Old Colony Company with shovel-handles in 1867 and 1868.

They then asked the witness as follows:

Question. What was the quality of the handles furnished by the plaintiff to the Old Colony Company in 1867 & 1868?

(To this question the defendants' counsel objected, on the ground that it was irrelevant and incompetent, and not admissable to show the quality of the handles furnished the defendants.

The plaintiff's counsel then stated that he proposed to show, in connection with the offered testimony, that the handles were of the same general quality as those furnished defendants. And thereupon the said

court overruled said objection; to which ruling and decision of said court the defendants, by their counsel, then and there excepted.)

The witness thereupon answered that the quality of the handles sent the Old Colony Company in 1867 and 1868 was good.

The plaintiff, further to maintain and prove the issue on his part, introduced as a witness CHARLES CASTLINE, who testified that he was making selections for handle-timber for the plaintiff in 1867
166 and 1868 at Grand Rapids.

Thereupon the plaintiff's counsel asked the witness the following questions:

How did you select handle-timber at Grand Rapids 1867 & 1868, and what was the quality of the handles?

To this question the defendants' counsel objected, upon the ground that it was irrelevant and immaterial, and it does not appear that the same timber was sent to the defendants.

Thereupon plaintiff's counsel stated that he proposed to show that the selected timber went into handles which went to the defendants.

The court overruled the said objection and the defendants' counsel then and there excepted to said ruling and decision.

The witness answered that he selected a large quantity of good timber from which to make handles; it was straight white ash of good quality and the handles were assorted into 1st and 2nd quality.

Thereupon the plaintiff to maintain the issue on his part asked the witness this question:

"How did you select the handles?"

This was objected to by the defendants' counsel on the same grounds last above stated, and also because it did not appear that the handles so selected went to the defendants.

167 The plaintiff's counsel said they proposed to show that the selected timber went into handles, which handles went to the defendants.

Thereupon the said court overruled the said objection; to which ruling and decision of the said court the defendants, by their counsel, then and there excepted.

The witness then said that he selected and assorted them into two qualities, firsts and seconds, and put them into dozen bundles; that he took great pains and tried to do it as it should be done.

The plaintiff further called as a witness one WILLIAM S. MCCORMICK, who gave similar testimony to the witness Castline, under the same objections, rulings, and exceptions.

And thereupon the plaintiff, further to maintain and prove the issue on his part, recalled the witness QUIMBY, the plaintiff, who gave testimony as follows: The timber testified about by the preceding witnesses was sent to the defendants and others; about three-fourths of it went to the defendants; the same kind and quality to the Old Colony Company in 1867–'68. I shipped the defendants handles from several different mills in 1867 & 1868, manufactured at New Baltimore, Armada, and Memphis; also had a mill in Canada; was at the mills weekly, and at some of them oftener.

In 1867 & 1868 I bought 6 millions feet of timber to get out 40,000 dozen handles.

168 It took two thousand feet to make 100 dozen handles; the handles I furnished defendants in 1867 & 1868 would take 800 thousand feet of timber; that these handles were of the best workmanship and manufacture and thoroughly well made in Michigan and Canada.

by the plaintiff or under his supervision, and were carefully graded as "firsts" and "seconds," and tied up in bundles of one dozen each; that the handles given in the stipulation were all "firsts" except the following shipments: December 20th, 1866, 696 dozen; October 22nd, 1867, 447 doz.; October 6th, 1868, 269 dozen; October 31st, 1868, 68 doz.; that the alleged settlement of the business of 1866, testified to by the defendants' witness Kennedy, was in this way: Witness presented his accounts of his shipments. Mr. Kennedy presented defendants' account showing balance due witness of some twenty-one dollars, and one hundred and seventy-two dozen handles charged back as broken. Witness refused to allow that number; the matter was referred to Oakes Ames, who agreed to pay witness one hundred and twenty-five dollars for one hundred dozen of the one hundred and seventy-two dozen claimed to have been broken.

The "firsts" are a number 1 article; good, straight timber selected. The "seconds" are those that may be a good handle, but still
169 with some imperfections; 1st quality is straight-grained, good, merchantable article.

The timber and workmanship better in '67 & '68, better than before. When I was at N. Easton I would walk thro' with the members of the firm. They would say, "way off somewhere there were some broken handles;" wouldn't show them to me.

The gold contract dated January 2nd, 1865, was not signed 2nd January, 1865, on the evening of that day.

Ques. When was that contract signed?

To this question the defendants' counsel objected on the ground that it was irrelevant and immaterial, and there had been no previous denial by affidavit or otherwise of the execution of the contract and it was incompetent.)

To this the pl'ff replies the fact of the execution of the contract is not denied, but he proposes to show the time of the execution of the contract was on Sunday, which avoids the contract.

The court thereupon overruled the said objection, and to the said ruling and decision of the said court, the defendants, by their counsel, then and there excepted.

The witness then answered: It was signed and delivered on Sunday afternoon, about 3 o'clock p. m., January 1st, 1865, in the defendants' office at North Easton, Mass. I left North Easton in the
170 morning about 8 o'clock of January 2nd, 1865, for Boston, where I arrived, and left there for New York about 3 o'clock p. m. the same day. I am able to find these dates from my diary and from something I noticed on this contract. It was signed at the office of Mr. Ames, defendant. Both Saturday night and Sunday night I stayed at the house of Oliver Ames, 2nd; we went to church Sunday morning. I do not think I went down to the office with him, but I went down there in the afternoon and found him in. I had talked up the gold contract with Oakes Ames, Oliver Ames, and Fred. Ames, on Friday and Saturday. When I went there Sunday and found Oliver 2nd in the office, he had the contract already drawn and took it out of the desk and presented it to me to sign; there were two contracts. I signed one first. He signed the other first. I passed it back to him, he signed it and cancelled the stamp and passed it over to me to cancel the stamp. I wrote on it I. L. Q., Jan'y 1, 1865, and passed it back. He called my attention to the 1, and said he would alter it. He did change it to a 2. There was no one present when we executed the contract. Oakes A. Ames was there, I think when I first went to the office. I did not go to the

office Monday morning. I did not see Frederick Ames Monday morning. I did not see any member of the firm except Oliver
171 Ames, 2nd, after I signed the contract. I took breakfast with him Monday morning about seven o'clock and he went with me to the depot. What I see on the contract that helps me to remember is the cancellation of the stamp and the change of the 2 from a 1. I was at North Easton Friday and Saturday nights, but was not there Saturday during the day.

And thereupon the plaintiff again rested his case.

And thereupon the defendants again took the case, and to maintain and prove the issue on their part called, as a witness, OLIVER AMES, 2ND, who testified that the said gold contract was not executed on Sunday; that the stamp was not cancelled by the witness, but by Frederick L. Ames, another member of the firm. That the witness signed the name of Oliver Ames & Sons to the contract, but that Frederick L. Ames wrote the cancellation on the stamp.

And the defendants further called, as a witness, GEORGE W. KENNEDY, who testified that he had been the book-keeper of the firm of Oliver Ames & Sons many years. That he knew the handwriting of Oliver Ames, 2nd, and of Frederick L. Ames very well. That the signature to the said gold contract of date January 2nd, 1865,
172 was in the handwriting of Oliver Ames, 2nd, and that the cancellation of the stamp was in the handwriting of Frederick L. Ames. There is no writing of Oliver Ames, 2nd, upon the stamp.

The defendant further to maintain and prove the issue on their part called as a witness FREDERICK L. AMES, who testified that he had charge of the defendants' office in 1865. Had charge of accounts, oversight of clerks, had charge of cash, and did greater part of correspondence and took part in business questions. That he remembered the gold contract of January 2nd, 1865. The witness was shown it and recognized the contract, I was present when it was executed. The plaintiff; Quimby, Oliver Ames, 2nd, here present, Oakes Ames, Oliver Ames, senior, and myself were present in our office in North Easton, Mass., on January 2nd, 1865. It was not made on Sunday.

The stamp on the contract was cancelled by me. It is not in the handwriting of Oliver Ames. I see that I commenced writing a D for December instead of a January, as it was the first of a year.

On cross-examination the witness said: I am not positive as to the time of day. Without seeing the papers I could not tell the day of the month or day of the week. I cannot remember whether the plaintiff was
173 there on Friday or Saturday previous to January 1st: do not recollect where he stayed or when he left, nor the day he came, nor where he was on Saturday, the 31st of December, 1864, nor on Monday, the 2nd of January. I do recollect that the day this paper was executed he was at our office. I remember that it was signed the day it bears date—the same day.

And thereupon the defendants rested their case.

This bill presents the substance of the evidence in the case so far as the same is necessary or material to the presentation of the points raised by the bill of exceptions, and presents all the evidence tending to show that the timber and handles selected, manufactured, and assorted at Grand Rapids in 1867 & 1868 by plaintiff went to the defendants, and also all the testimony as to whether the handles furnished the defend-

ants were of the same quality as those furnished the Old Colony Company.

And thereupon the said court proceeded to charge the jury.

And the defendants counsel thereupon requested the court to charge the jury:

"That under the contract for 1866 the defendants were at liberty to charge the plaintiff back with the full value of such handles as broke in the process of bending."

174 But the said court, after reading the said request to the jury, proceeded to say: "That request should be qualified in the judgment of the court in this way: the language of the contract is that they should be rejected as heretofore." Now if the facts in the case show that the method of rejecting was as claimed by the defendants, then there would be no qualifications to this request, but if the evidence shows that the rejection was only when Quimby's attention was subsequently called to the rejected handles and it was then to be settled between them as to the amount of rejected or broken handles, then the qualifications would need to be made and should be made, as I understand the contract.

To which ruling and decision and charge of the said court and to his modification of the said request, the defendants, by their counsel, then and there excepted.

Thereupon the defendants' counsel requested the said court to charge the jury as follows:

"That after October 8th, 1866, the plaintiff can only recover said extra price of 12½ cents per dozen for such handles as were charged on his bill of particulars at 1.37½ namely, 10,408 dozen, and he can only recover that price for such of them as are shown to have been delivered under an order from the defendants to forward them prior to April 20th, 1867."

175 And thereupon the said court said to the jury: This involves the question of whether the plaintiff is bound by the price carried out in his bill of particulars; we think he is not, and therefore refuse this request.

We do not say that the plaintiff can recover for any more handles than his bill of particulars sets forth; but if he has made a mistake in carrying out the rate or price, it is not binding. He may show what he was actually to have, but he could not recover the 1.37½ on any more of the handles than he specifies in his bill of particulars.

To which last ruling and decision and refusal to give the said request as made, the defendants, by their counsel, then and there excepted.

But the court, at the request of the defendants, also charged the jury as follows:

Eighth. That under the contract of December 25th, 1866, and which governed the transactions of 1867, the plaintiff was only entitled to the extra price of 12½ cents per dozen for such handles as are shown to have been required by the defendants and ordered by them to be forwarded before April 20th, 1867.

And the court, of its own motion, charged the jury as follows:

The question arises in reference to handles shipped after navigation had closed, when the price would rule higher than $1.25 how far

176 *the plaintiff furnished such goods upon the request or by the direction of the defendants, is for the jury; the defendants would be liable for such goods, and such only, as were furnished under the contract or by the subsequent orders and directions of the defendants, at that price.

All goods furnished, not ordered or directed or covered by the contract, must be at the reduced price, at the lower price of $1.25 for first class, and the reduced price for those that were seconds.

And thereupon the said counsel for the defendants requested the court to charge the jury as follows:

"If the jury find that there was no contract governing the operations of 1868, then they can only give the plaintiff what the handles were reasonably worth, not exceeding $1.25 per dozen, the price claimed in the bill of particulars, and less than that sum if the price is less."

As I recollect the matter of evidence, there is no evidence of any larger price or amount than $1.25, and that price would govern as to that year, 1868. That request is granted.

To which last opinion, ruling, and charge and modification of the request to charge aforesaid, the said counsel for the defendants then and there excepted.

177 And the said court, under the charge and with the directions aforesaid, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid to the said jury, and the jury aforesaid then and there on, to wit, April 11th, A. D. 1879, gave their verdict for the said plaintiff, and assessed his damages at the sum of twelve thousand eight hundred and sixteen and $\frac{53}{100}$ dollars.

And because none of the exceptions so offered and made to the opinions and decisions of the said court do appear upon the record of the said trial, therefore on the prayer of the said defendants, by their said counsel, the said court hath signed this bill of exceptions, this thirty-first day of July, A. D. 1879.

S. L. WITHEY,
Dist. Judge.

Ex'd & comp. & found correct.

L. D. N.

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

I, Henry M. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true and compared copy of the original files and records and the whole thereof in the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court in Grand Rapids, this 8th day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] HENRY M. HINSDILL, *Clerk.*
By JOHN McQUEWAN, *Deputy.*

(Indorsed:) No. 387. The U. S. circuit court, western district of Michigan, so. division. Ichabod L. Quimby vs. Oliver Ames, 2nd, et al. Bill of exceptions. Filed July 31, 1879. H. M. Hinsdill, clerk.

(Indorsement on cover:) No. 337. Oakes A. Ames, Frederick L. Ames, & Oliver Ames, 3rd, survivors of themselves & Oakes Ames & Oliver Ames, deceased, copartners under the firm-name of Oliver Ames and Sons, pl'ffs in error, vs. Ichabod L. Quimby. W. Michigan C. C. U. S. Filed 14th October, 1879.

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United States.

OAKES A. AMES, FREDERICK L. AMES AND OLIVER AMES, THIRD, survivors of themselves and OAKES AMES and OLIVER AMES, deceased, co-partners under the firm name of OLIVER AMES & SONS,

Plaintiffs in Error,

vs.

ICHABOD L. QUIMBY.

OCTOBER TERM 1882, No. 68.

Brief for Plaintiffs in Error.

MITCHELL J. SMILEY,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OAKES A. AMES, FREDERICK L. AMES AND OLIVER AMES, THIRD, survivors of themselves and OAKES AMES and OLIVER AMES, deceased, co-partners under the firm name of OLIVER AMES & SONS,

Plaintiffs in Error,

vs.

ICHABOD L. QUIMBY.

ASSIGNMENT OF ERRORS.

And now comes the said plaintiffs in error, by Hughes, O'Brien & Smiley, their attorneys and counsel, and say that in the record and proceedings in the Circuit Court of the United States for the Western District of Michigan there is manifest error, in this, to-wit:—

FIRST.

The said Circuit Court erred in permitting the defendant, Quimby, when called as a witness upon rebuttal, to answer against the objections of the plaintiffs' counsel, the ques-

tion, "When was that contract signed?" meaning the contract of January 2nd, 1865, and allowing the said witness, against the said objections, to give testimony tending to prove that the said contract was executed upon Sunday.

(See folio 169 of the printed record.)

SECOND.

The said Court erred in allowing the said witness, Quimby, against the objections of the plaintiffs' counsel, to testify that the contract of December 25th, 1866, was different from the one declared upon in the defendant's plea, and different from the one introduced in evidence by the defendants, and to answer against said objections, the question, "What change was made in the duplicate which you had?"

(See folio 160 of the printed record.)

THIRD.

The said Court erred in allowing the plaintiff to prove the price of handles to be $1.37\frac{1}{2}$ per dozen, and allowing the plaintiff to recover $1.37\frac{1}{2}$ per dozen, for handles that were charged in the plaintiff's bill of particulars at $1.25 per dozen, and in charging the jury upon that subject, as follows: "This involves the question of whether the plaintiff is bound by the price carried out in his bill of particulars; we think he is not, and therefore refuse this request."

And in refusing the request thus referred to, made by the defendant's counsel, which is as follows:

"After October 8th, 1866, the plaintiff can only recover said extra price of $1.37\frac{1}{2}$ per dozen for such handles as

were charged in his bill of particulars at $1.37½, namely, 10,408 dozen."

(See folios 174 and 175 of record.)

FOURTH.

The said Court erred in allowing the deposition of Simeon Staples to be read to the jury, and in allowing the answer of said witness to be read to the jury, against the defendant's objection, to the following question:

"What was the quality of the handles furnished by the plaintiff to the Old Colony Company, in 1867 and 1868."

(See folio 165 of record.)

FIFTH.

The said Court erred in refusing to charge the jury, as requested by the defendant's counsel, as follows: "That under the contract for 1866, the defendants were at liberty to charge the plaintiff back with the full value of such handles as broke in the process of bending."

And in qualifying the said request by stating as follows: "That request should be modified, in the judgment of the Court, in this way; the language of the contract is, they should be rejected as heretofore; now, if the facts in the case show that the method of rejecting them was as claimed by the defendants, then there would be no qualifications to this request; but if the evidence shows that the rejection was only when Quimby's attention was subsequently called to the rejected handles, and it was then to be settled between them as to the amount of broken or rejected handles, then the qualifications would need to be made, and should be made, as I understand the contract."

(See folios 173 and 174 of the record.)

tion, "When was that contract signed?" meaning the contract of January 2nd, 1865, and allowing the said witness, against the said objections, to give testimony tending to prove that the said contract was executed upon Sunday.

(See folio 169 of the printed record.)

SECOND.

The said Court erred in allowing the said witness, Quimby, against the objections of the plaintiffs' counsel, to testify that the contract of December 25th, 1866, was different from the one declared upon in the defendant's plea, and different from the one introduced in evidence by the defendants, and to answer against said objections, the question, "What change was made in the duplicate which you had?"

(See folio 160 of the printed record.)

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The said Court erred in allowing the plaintiff to prove the price of handles to be $1.37½ per dozen, and allowing the plaintiff to recover $1.37½ per dozen, for handles that were charged in the plaintiff's bill of particulars at $1.25 per dozen, and in charging the jury upon that subject, as follows: "This involves the question of whether the plaintiff is bound by the price carried out in his bill of particulars; we think he is not, and therefore refuse this request."

And in refusing the request thus referred to, made by the defendant's counsel, which is as follows:

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(See folio 165 of record.)

FIFTH.

The said Court erred in refusing to charge the jury, as requested by the defendant's counsel, as follows: "That under the contract for 1866, the defendants were at liberty to charge the plaintiff back with the full value of such handles as broke in the process of bending."

And in qualifying the said request by stating as follows: "That request should be modified, in the judgment of the Court, in this way; the language of the contract is, they should be rejected as heretofore; now, if the facts in the case show that the method of rejecting them was as claimed by the defendants, then there would be no qualifications to this request; but if the evidence shows that the rejection was only when Quimby's attention was subsequently called to the rejected handles, and it was then to be settled between them as to the amount of broken or rejected handles, then the qualifications would need to be made, and should be made, as I understand the contract."

(See folios 173 and 174 of the record.)

SIXTH.

The said Court erred in failing and neglecting to give the request of defendant's counsel, as follows:

"If the jury find that there was no contract governing the operations of 1868, then they can only give the plaintiff what the handles were reasonably worth, not exceeding $1.25 per dozen, the price claimed in the bill of particulars, and less than that sum, if the price is less."

And in modifying the said request by stating as follows: "As I recollect the matter of evidence, there is no evidence of any larger price or amount than $1.25, and that price would govern as to that year, 1868."

(See folio 176 of the record.)

SEVENTH.

The said Court erred in not rendering a judgment for the defendants, and against the plaintiff, upon the special finding of facts made by the Court on the former trial.

(See pages 25 to 31 inclusive of record.)

And for the errors aforesaid, the said defendants, plaintiffs in error, pray that the said judgment may be set aside vacated, reversed, and held for naught, and that judgment, may be entered for the said defendants, and against the said plaintiff, on the special finding in this Court.

HUGHES, O'BRIEN & SMILEY,

Attorneys and of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OAKES A. AMES, FREDERICK L. AMES AND OLIVER AMES, THIRD, survivors of themselves and OAKES AMES and OLIVER AMES, deceased, co-partners under the firm name of OLIVER AMES & SONS,

Plaintiffs in Error,

vs.

ICHABOD L. QUIMBY.

Statement of the Case and Brief for Plaintiffs in Error.

This cause was before this Court on a former occasion, and is reported in the 96 U. S., page 324, when the judgment of the Court below was reversed upon the construction given a gold contract, so called.

The plaintiff in the Court below, who is defendant in error here, is a resident and citizen of the Western District of Michigan, and the defendants are citizens of Massachusetts.

The action is assumpsit, brought in the Western District of Michigan to recover the price and value of a large quan-

tity of shovel handles furnished by the plaintiff to the defendants, to be used in their business of shovel manufacturers at North Easton, Massachusetts.

Some of the handles were made in Michigan and some in Canada, and they were delivered by the plaintiff at North Easton during the years 1665, 1866, 1867 and 1868.

The declaration is upon the common counts, and will be found at pages 14 and 15 of the printed record.

The defendants demanded a bill of particulars, which was furnished.

(See folios 50 and 51 of the printed record.)

The defendants then plead the general issue, and gave notice of special matters, in accordance with the Michigan practice, which included a notice of set-off and asked to have a balance certified in their favor.

Also that the handles were furnished under a contract by which they were to be of first quality.

One contract, dated January 2d, 1865, which was the gold contract.

That the handles were of an inferior quality, from which the defendants suffered damages which they would recoup.

Also that the price of gold changed so as to reduce the price of handles under this contract.

Also that the said handles were furnished under a certain other contract, dated January 27th, 1866, by which the plaintiff agreed to furnish handles of a good quality, which would not break in the process of bending.

That the handles furnished were not of the required quality, and the defendants thereby sustained damages which they would recoup.

Also that the handles were furnished under another contract, dated December 25th, 1876, whereby the plaintiff agreed to furnish handles of a good quality.

That the handles furnished were of a poor quality, by which the defendants suffered damages which they would recoup upon the trial.

The terms of the several contracts were set forth in this notice, in detail.

The plaintiff demanded a bill of particulars of the defendants.

(See pages 17, 18, 22, 23, 24 of the record for the pleas, and pages 18, 19, 20 and 21 for the defendant's bill of particulars.

An amended notice of the defence was made and filed, and a stipulation made that both notices should stand and be considered as one.

(See folio 79 of the printed record.)

On the first trial a jury was waived by written stipulation and the cause was tried by the Court.

The Court found the facts specially which under the Michigan practice has the force and effect of a special verdict, and found as matter of law that the defendants were not entitled to a reduction in the price of handles under the gold contract, and upon that basis the Court rendered judgment in favor of the plaintiff, for seven thousand eight hundred and twenty-five dollars and sixty-two cents.

The plaintiff filed no exceptions to this report.

The defendants, however, filed exceptions to the Judge's conclusion of law, and brought the case to this Court, by writ of error, where a different construction was put upon the gold contract, which entitled the defendants under the

finding of facts of the Court below to a large judgment against the plaintiff.

This Court did not render such judgment, however, but ordered a new trial.

Another trial was had in the Court below, and this time by jury, and a still larger judgment was rendered against the defendants on a second trial.

A bill of exceptions was settled, and the case brought here by writ of error.

The bill of exceptions will be found in the record, beginning at page 50.

FIRST POINT.

A stipulation was made showing the number of handles delivered by the plaintiff during the four years, from 1865 to 1868, inclusive, with the dates of delivery; also showing the payments made by the defendants with the date of such payments, leaving the quality of the handles and all other questions of fact not stipulated, open to the jury, for other and further evidence.

(See pages 50, 51, 52 and 53 of the record.

This stipulation was introduced in evidence by the plaintiff, and thereupon the plaintiff was sworn in his own behalf.

He testified that there was a contract in writing, signed by the parties, for the year 1865, for fifteen thousand dozen handles.

The contract was shown to him; he identified it; it was offered and received in evidence upon the plaintiff's testimony, the plaintiff's counsel objecting that it was irrelevant and immaterial. It was the gold contract, so called, of January 2nd, 1865.

Two other contracts covering the subsequent years were also proven and introduced in evidence in the same way.

(See record, page 54, folio 154.)

After the plaintiff had rested his case, and the defendants also had introduced their evidence and rested their case, the plaintiff was re-called, and at the very close of the case, and as the very last of his testimony, stated that the contract dated January 2d, 1865, which had already been introduced in evidence and proven by his own testimony, was not made on the day it bore date, but was signed on the previous day, which was Sunday, and claimed thereby to prove the invalidity of the said contract.

This testimony was objected to by the defendant's counsel upon the ground that it was irrelevant and immaterial, and there had been no previous denial of its execution by affidavit or otherwise, and that the testimony was incompetent.

These objections were overruled and the witness answered testifying that the contract was executed on January 1st, 1865, which was Sunday.

(See record, page 60, folio 169.)

We submit that the Court was in error in permitting this testimony to be given, in view of the then situation of the case and what had already transpired upon the trial.

The plaintiff had given evidence of the execution of this contract sufficient to allow its introduction in evidence.

It had been introduced and read in evidence upon his own testimony.

No suggestion was made by him or his counsel of any infirmity or invalidity in the contract.

It was allowed to be introduced in evidence as a valid

contract, covering the operations of the parties during the year 1865.

It had passed through one trial and been treated as a valid contract, and found to be such by the Court in its special findings.

It was evident when his testimony was subsequently offered upon the rebutting, that he had purposely withheld this testimony for the purpose of surprising the defendants and gaining an unjust advantage upon the trial.

After allowing this contract to go in evidence as a valid contract, he should not have been permitted by the Court to testify on rebutting that the contract had been made at a time different from that which he had led the Court and the defendants to believe it had been made at, on the direct.

This Court, as well as the Court below, can see that the effect of such a proceeding would be to surprise the defendants, and deprive them of the testimony material upon the point, which they could have obtained in time to use upon the trial, had the plaintiff acted in fairness and good faith.

There is another reason why the testimony should not have been admitted.

Court Rule 79, governing the pleadings and practice in Michigan, reads as follows:

"Upon the plea of the general issue in an action upon any written instrument, under seal, or without seal, the plaintiff shall not be put to the proof of the execution of the instrument or the handwriting of the defendant, unless the defendant, or some one in his behalf shall file and serve a copy of an affidavit denying the same, and this rule shall apply in actions brought against indorsers, as well as other

parties, and shall also apply in favor of a defendant in cases where claims by way of set-off are insisted upon by him.

Such affidavit shall be filed, when by the defendant, with the plea, and when by the plaintiff, within ten days after service of the specific set-off claimed; but the Court may, upon proper showing, enlarge the time for filing such affidavit.

This contract of January 2d, 1865, was declared upon within the rule, in the defendants plea and notice.

The date and the terms of the contract were fully stated and set forth and relied upon by the defendants.

If the plaintiff had intended denying the execution of the contract, as there set forth, he should have filed an affidavit denying the same, as required by rule 79.

By failing to file such affidavit, the execution of the instrument as declared upon, was admitted.

In this plea, the contract was declared upon as one of date January 2d, 1865.

An admission of its execution admitted its execution upon that day, which would make it a valid contract.

The defendants testimony was directed towards showing that the contract declared upon was not executed.

This rule in the Michigan practice is construed as excluding all evidence tending to show that the contract was not made as declared upon, and a failure to file such affidavit admits the execution of the contract, in manner and form as it is alleged.

See Curran v. Rogers, 35 Mich. 221.

Jacobson v. Miller, 41 Mich. 90.

The execution of a note upon Sunday is equivalent in law to no execution at all.

The theory of the law being that what is done on Sunday cannot legally be done, and hence, in law, is not done at all.

If the defendant wished to show that there was no binding contract between the parties, because of its having been executed on Sunday, he should have stated in an affidavit, under rule 79, the facts showing that there was really no valid execution of the instrument.

Under the pleadings in the cause the defendant was at liberty to, and justified in treating the execution of the instrument as declared upon as an admitted fact.

It executed as declared upon it was not a Sunday contract, but one made on Monday, and hence valid.

SECOND POINT.

The contract of December 25th, 1866, was likewise declared upon, and introduced in evidence.

Said contract will be found at folios 157 and 158, on pages 55 and 56 of the printed record.

After it had been introduced in evidence, on re-direct examination the witness Quimby was allowed to testify that the contract introduced in evidence was not like the duplicate which he had.

(See folios 159, 160 of the printed record.)

This contract was duly declared upon by the defendants, at page 24, folios 73 and 74, including the statement in regard to the commissions.

There was no denial of the execution of this contract, under rule 79, and yet against this objection the plaintiff was allowed to vary the terms of the contract, and to testify that such a contract as declared upon was not executed by the parties, but a different one, having different terms and provisions. He claimed to change but a single word, but a word is often of considerable importance, as it was in this case, upon the subject of the commissions which should be allowed.

THIRD POINT.

Upon the trial the plaintiff gave testimony in regard to the price of handles delivered from November 2nd to April 20th. 1867, and claimed that all handles delivered during that period should be charged at the rate of $1.37\frac{1}{2}$ per dozen.

The defendant's counsel thereupon called the Court's attention to the fact that in the bill of particulars served upon the defendants, a portion of those handles for which he now claimed $1.37\frac{1}{2}$, per dozen, were charged at the rate of $1.25 per dozen.

And thereupon made the point and claimed that the plaintiff could only be entitled to $1.37\frac{1}{2}$ per dozen, for those charged in the bill of particulars at that sum.

Under the plaintiff's claim, however, that the bill of particulars contained a mistake in that respect, the witness was allowed to go on.

(See page 57, folio 161 of record.)

And later in the case the Court was asked to charge the jury that the plaintiff could only recover $1.37\frac{1}{2}$ per dozen,

for such handles as were charged on his bill of particulars at that rate.

The Court declined to grant this request, and in reply to it said to the jury "this involves the question of whether the plaintiff is bound by the price carried out in his bill of particulars; we think he is not, and therefore refuse this request."

In this, we claim the Court was in error.

Court rule 37, governing the practice of Michigan, reads as follows:—

"In cases where the defendant is entitled to demand a bill of particulars, the plaintiff shall furnish such bill, unless it has been already furnished, on being served with a notice requiring the same, by the defendant, or his attorney, and if such bill be demanded before the expiration of the time for filing the plea, the defendant shall have like time to plead, after receiving the bill of particulars, to which he was entitled at the time of receiving such notice."

In Davis v. Freeman, 10 Mich., 192, it is said that the office of a bill of particulars is to inform the opposite party of the cause or causes of action the party giving it intends to rely upon at the trial, not specifically set forth in the declaration or notice, accompanying the general issue.

In Bennet v. Smith, 40 Mich., 211, it is expressly held that there can be no recovery for items not in the bill of particulars, nor for more than it alleges.

The object of a bill of particulars being to inform the party of the nature and extent of the demand for which he is sued, the plaintiff's claim should be confined to the items mentioned in the bill, and to the prices claimed therein.

The defendant, seeing the handles charged in the bill at $1.25 per dozen, might be content with the price, and go into the trial with no evidence to prove that they were worth no more, and to show that no greater price was agreed upon to be paid for them.

The price stated in the bill is similar to the *ad damnum* clause in the declaration.

The plaintiff can never recover more than is claimed in such a clause.

It may have been within the power of the Court to allow the plaintiff to amend his bill of particulars, but no leave to amend was asked and none obtained.

Such an amendment would have been one of substance, and would have entitled the defendants to a continuance to prepare to meet the amended bill of particulars with proper evidence.

FOURTH POINT.

After the defendant had given notice of the inferior quality of the handles furnished them, the plaintiff upon rebuttal offered the deposition of Simeon Staples, who testified that he was in the employ of the Old Colony Company, another manufacturing company in Massachusetts.

That the plaintiff furnished the Old Colony Company with shovel handles in 1867 and 1868.

He was then asked the question by the plaintiff's counsel what was the quality of the handles furnished by the plaintiff to the Old Colony Company, in 1867 and 1868.

This was objected to on the ground that it was irrelevant and incompetent, and not admissible, to show the quality of the handles furnished to the defendants.

This objection was overruled by the Court, upon the plaintiff's counsel saying that they proposed to show in connection with this testimony, that the handles were of the same *general quality* as those furnished the defendants.

(See folio 165, page 58 of record.)

This point was entirely collateral to the main point in issue, and did not tend to prove the quality of the handles furnished the defendants.

The handles furnished the defendants may have been of one quality and those furnished to the Old Colony Company of another and entirely different quality; indeed, from the nature of the commodity they could not be the same, as timber furnished from one tree is necessarily different from that furnished from another tree.

And the question whether the handles were of the same general quality raised a collateral inquiry which the defendants could not reasonably be called upon to meet.

1 Greenleaf Evidence, Sec. 52.

Odiorne vs. Winkley, 2 Gall. 51.

Upon the same principle, specimens of handwriting not admitted to be genuine are not admissible, for the purpose of instituting a comparison with the handwriting in question.

2 Phillips Evidence, 610.

Vinton vs. Peck, 14 Mich. 293.

If evidence of this character is admissable for the plaintiff then the defendants must come prepared to prove the quality of handles delivered to each of plaintiff's customers,

or show that such handles were different in quality from theirs.

The admission of such testimony would allow the plaintiff to select the witnesses to whom he delivered the best of his handles, to testify as to their quality.

It would place the defendants at a great disadvantage, and compel them to meet testimony unfairly selected by the plaintiff or allow their cause to be prejudiced before the jury.

The offer of the plai tiff made in connection with this testimony could not avoid the difficulty.

The offer only went to the extent of proposing to show that the handles were of the same general quality as those furnished the defendants.

Not that they were the same, for every one must know that they were necessarily different.

The testimony subsequently offered was entirely unsatisfactory, as it showed that the defendants had only a small share of the handles manufactured by the plaintiff, from a very large quantity of timber selected in different localities, and manufactured at different mills.

The bill of exceptions contains all the evidence introduced upon this subject.

(See folios 167, 168, and 173 of the record.)

FIFTH POINT.

After the evidence was closed, the counsel for the defendants requested the Court to charge the jury that under the contract of 1866 the defendants were at liberty to charge

the plaintiff back with the full value of such handles as broke in the process of bending.

The Court declined to grant such request, and modified the same by saying, "that the language of the contract is that they should be rejected as heretofore; and if the evidence shows that the rejection was only when Quimby's attention was subsequently called to the rejected handles, and it was then to be settled between them as to the amount of rejected or broken handles then the qualification would need to be made, and should be made."

[See folios 73 and 74 of the record.]

This charge of the Court, and his qualification of the request made, was erroneous and tended to mislead the jury.

The true construction of the contract referred to, (and which contract is found at page 55, folios 155 and 156 of the printed record) is, that the defendants had heretofore, in their dealings with the plaintiff, rejected such handles as broke in the process of bending, and secondly, that they should exercise the same right as to the handles which were to be delivered under that contract.

Under the contract the defendants had a right to reject such handles as broke in the process of bending, as a matter of right.

The judge's charge to the jury did not accord the defendants this right.

The right to reject the handles was made to depend upon the plaintiff's subsequent assent to their being rejected, upon his attention being called to them.

The effect of this instruction was to leave it to the jury to say whether these handles should be rejected, and they

were to determine that question by ascertaining whether Mr. Quimby's attention had been subsequently called to the rejected handles and the parties had looked them over and agreed upon the amount of rejected or broken handles.

This was in direct conflict with the written agreement, which provided that those handles which broke in the process of bending, should be rejected as heretofore, as matter of right.

SIXTH POINT.

The counsel for the defendants requested the Court to charge the jury, as follows :—

"If the jury find that there was no contract governing the operations of 1868, then they can only give the plaintiff what the handles were reasonably worth, not exceeding $1.25 per dozen, the price claimed in the bill of particulars, and less than that sum if the price is less."

In reply to that request the Court said :—

"As I recollect the matter of evidence, there is no evidence of any larger price or amount than $1.25, and that price would govern as to that year, 1868 ; that request is granted."

In these remarks the Court in substance directed the jury that $1.25 would be the price of handles for 1868.

(See record page 63, folio 176.)

When there was evidence in the case that handles were worth only $1.20 per dozen for first quality, and sixty cents for second quality, for the year 1868.

See testimony of Horace Perkins, folio 164.

Although the Court stated that the request was granted, and also stated that there was no evidence of any larger price than $1.25 for the handles of 1868, he also stated that that price would govern as to that year, and failed to call the attention of the jury to the testimony of Mr. Perkins that the price for that year was only $1.20.

That there was a conflict of evidence upon which the jury were to pass.

This had the effect of misleading the jury upon that point.

SEVENTH POINT.

This Court has often decided that it would not review the action of a Circuit Court in granting or refusing a new trial, but we respectfully ask that the Court will examine the application made for a new trial in this case, and the affidavits on which it was founded, which are in the record, pages 45, 46 and 47.

More especially for the purpose of observing how injuriously the ruling of the Court upon the first point made in this brief operated upon the defendants, in this particular case.

There is another matter to which we wish to call the attention of the Court.

Upon the first trial of the cause, the Court below made a special finding of facts.

That finding of *facts* was not excepted to by either party.

The legal conclusion of the Court below was excepted to by the defendants.

The case was brought here, and the conclusion of the Court below was overruled.

We supposed by the settled law of this Court, as well as by the settled practice of Michigan, that a special finding of facts had the force and effect of a special verdict by a jury, and that the defendants were entitled to a judgment in this Court, in their favor, upon that special finding.

The Court, however, in reversing the former judgment, ordered a new trial.

Whether this was intentionally, or inadvertently, done, we do not know, but inasmuch as that special verdict has never been set aside, was never excepted to, and still stands as a special verdict, are not the defendants entitled to a reversal of this judgment, and also to a judgment here, upon that special verdict?

Rule 87 of the Michigan Court Rules, provides as follows:

"When cases are tried by the Court without a jury, either party may, if he sees fit, at any time before judgment, present such points of law as may be deemed material, in the same manner in which such points are presented upon the requests to charge, in jury trials. And the Court in its finding shall pass specially upon such points, as in charging the jury, as near as may be, whenever such points are presented, and also whenever the Court is requested, in writing, before judgment, the facts as well as the law shall be embodied in the finding."

Rule 90 provides as follows:

"The finding of the facts by the Court shall be treated in all respects as a special verdict, and error may be alleged

that the same does not support the judgment, as on a special verdict, but no rule of law embodying any such finding can be reviewed except on exceptions, or on a case made as provided by statute."

Under these rules, it is the practice in Michigan, upon reviewing a case where a special finding has been had to enter such judgment in a Court of review, as the plaintiff in error is ntitled to upon the special finding made by the Court.

Peabody vs. McAvoy, 23 Mich. 526,

The same practice has obtained in this Court.

Insurance Co. vs. Boykin, 12 Wall. 433,

And we submit that such should have been the course taken upon the reversal of the former judgment, and that such should be the result now.

MITCHELL J. SMILEY,
Counsel for Plaintiffs in Error.

tes.

or.

Error.

16-342

OFFICE SUPREME COURT U.S.
FILED
OCT 17 1882
JAMES H. MCKENNEY, CLK

Supreme Court of the United States.

OCTOBER TERM, 1882.

NO. 68.

OAKES A. AMES, FREDERICK AMES AND OLIVER AMES, 3D, SURVIVORS OF THEMSELVES AND OAKES AMES AND OLIVER AMES, DECEASED, CO-PARTNERS UNDER THE FIRM NAME OF OLIVER AMES & SONS, Plaintiffs in Error,

vs.

ICHABOD L. QUIMBY, Defendant in Error.

Brief and Argument for Defendant in Error.

LYMAN D. NORRIS,
Of Counsel for Defendant in Error.

UNITED STATES OF AMERICA.

Supreme Court of the United States.

OAKES A. AMES, FREDERICK AMES AND OLIVER AMES, 3D, SURVIVORS OF THEMSELVES AND OAKES AMES AND OLIVER AMES, DECEASED, CO-PARTNERS UNDER THE FIRM NAME OF OLIVER AMES & SONS, Plaintiffs in Error,

vs.

ICHABOD L. QUIMBY, Defendant in Error.

In Error to the Circuit Court of the United States, for the Western District of Michigan, Southern Division.

STATEMENT.

This action was begun July 16, 1872 (R. p. 4, f. 10). The theory of the plaintiffs' declaration in this cause, common counts, (R., pp. 14 and 15) goes for certain sales made by plaintiff and delivered to defendants, at North Easton, Mass., of 73,720 dozen long and short shovel handles, (*reduced and fixed by stipulation* (R., pp. 50, 51 and 52) at 73,574 doz.) during the years 1865, '6, '7 and '8. That plaintiff had *fully* performed all his agreements, some written and some oral, touching the goods "sold and delivered," and had a right in law under this form of declaration, to

recover the unpaid balances of the value or agreed price, from the defendants.

The number of handles and *date of delivery* is agreed and *stipulated*. (R. pp. 50, 51 and 52.)

The defendants appeared and plead the general issue and gave notice thereunder. (R., pp. 22, 23 and 24.)

1. Payments, by way of set-off. These payments were also agreed and stipulated. (R., pp. 52 and 53.)

2. That the sales were made under three written agreements; one of date January 2d, 1865, called the "gold contract"; one of January 27th, 1866, and the other of December 25th, 1866. (R., pp. 23 and 24.)

(*a.*) That the sliding scale fixed by the "gold contract," reduced the price of handles from $1.25 per doz. to 60c. (R., p. 23.)

(*b.*) That the quality of timber and the workmanship of handles, was not up to contract terms, resulting in damage to them, which

(*c.*) They would seek to recoup.

On the trial, defendant's attorneys produced, and (during the cross-examination of the plaintiff) had read in evidence, the written contracts aforesaid. (R., pp. 54, 55 and 56.)

In their notice they had not sought to give *copies* of these contracts, and the contract of December 25th, 1866, was not correctly given, in substance, even, (R., p. 24, folio 73, compared with R. p. 56, folio 157, bottom.)

The "gold contract" of 1865 was submitted by the trial court to the jury upon the question of *fact*.

Whether it was signed and delivered—executed—at North Easton, Mass., on Sunday, January 1st, 1865, and so void. *No complaint was, or is made of the law given to the jury, upon that question.*

There are but *eight* errors that can be assigned, on this record.

Five may go to the *admission* of plaintiff's evidence; one to the *qualification* of one of defendant's requests to charge; one to a *refusal* of a request, and one to the *granting* of a request, coupled with a statement of the judge's recollection, that the evidence was such as to make this granting proper.

1*st Objection and Exception.* (R., p. 56, folio 160.)

The contract of December 25th, 1866, had been executed in duplicate. Defendant's attorney had (on the cross-examination of plaintiff) produced and had read *their* copy, though variant, in *substance* from the one set up in their notice. Plaintiff on re-direct examination, was allowed *without objection* (R., p. 56, folios 159 and 160) to testify, that the duplicate he had, had been destroyed by fire; that by his duplicate he was to pay no commission of $2\frac{1}{2}$ per cent on drafts drawn against *his own money*—handles shipped—but only on drafts for *advances*, *before* shipment.

Against objection and under exception this witness was, *after the testimony above recited*, further allowed to testify to the existence of the word "advanced," in his burned duplicate, which word was not found in the defendant's copy.

2*d*, 3*d and* 4*th Objections and Exceptions*, (R., p. 58, f. 165; p. 59, f. 166-7.)

The issue being, the quality of timber and handles; the care in selecting timber and sorting handles, delivered in 1867–8 to defendants.

The evidence showed handles furnished in those years by plaintiff to the Old Colony Co. It also showed timber and handles selected for plaintiff in 1867–8 at Grand Rapids, Michigan.

Testimony was offered of the quality of handles furnished the Old Colony Co. in 1867–8 under an offer to *afterwards* show that the same quality went to plaintiffs. Testimony was also offered of the quality of timber and handles selected in 1867-8 at Grand Rapids, under an offer to *afterwards* show, that such selection went to defendants.

Under this offer and proposal to *afterward* connect their testimony, the evidence was admitted. There was exception. But there was *no motion to strike out*; no charge requested. *The attention of the court was not again* called to the objections.

Presumably, because there was testimony afterwards given to the jury, in performance of the proposal to connect the testimony as aforesaid. (R., p 59, f. 167, 168.)

5th Exception and Objection. (R., p. 60,f. 169.)

Testimony had been given, that the gold contract "was not signed 2d January, 1865, on the evening of that day." (R., p. 60, f. 169.) *This was without objection*, and was contradictory of the defendant Oliver Ames, 2d. (R., p. 58, f. 163.) It was followed by the question, "When was that contract signed?" The objection was, "irrelevant and immaterial; that its *execution* had not been denied by affidavit; was incompetent."

Under objection and exception the witness answered:

"It was signed and delivered Sunday afternoon, about 3 o'clock p. m., January 1st, 1865, in the defendant's office at North Easton, Mass," etc. (R., p. 60, f. 170.)

6th Objection and Exception. (R., p. 62, f. 174.)

The defendant's attorneys requested the court to charge, "that under the contract for 1866, the defendants were at liberty to charge the plaintiff back," (for that year, 172 doz. See testimony of Kennedy, R., p. 58, f. 163) "with the full value *of such handles* as broke in the process of bending."

It should have been *limited* to the handles delivered under that year's contract, which closed in October, 1866. Under that year's contract the defendants were to take "the *privilege* of rejecting *as heretofore*, all handles which break in the process of bending." (R., p. 55, f. 155.)

The court qualified the charge by inserting the words, "as heretofore," and left it to the jury to determine what the limitation "as heretofore"

was in fact. And there was evidence tending to show that this 172 doz. was matter of agreement and settlement, (R., p. 60, f. 168) and that "as heretofore" meant *mutual agreement*. (R., p. 60, f. 168.)

7th Objection and Exception. (R., p. 62, f. 174–5.)

The trial court allowed the plaintiff to amend his bill of particulars, which by mistake was erroneously extended on three shipments at $1.25 a doz; it should have been at $1.37½ a doz.

This bill of particulars is not in the record. It is not, under the Michigan practice, filed, but upon demand is served upon the demanding party. It then becomes his duty to have it put in evidence if he seeks to make any point on its existence or terms.

The instruction asked in this regard (R., p. 62, f. 175) was refused, only so far as it sought to hold the plaintiff to this mistaken extension of price, affecting three shipments in a bill of particulars which covered over seventy shipments. As this request was faulty in part, it might have been refused as a whole; yet proper instructions were given upon all the other points of the instruction asked. (See R., p. 62, folios 175 and 176.

8th Objection and Exception. (R. p. 63, f. 176.)

The request asked:

"If the jury find that there was no contract" (express) "governing "the operation of 1868, then they can only give the plaintiff what the "handles were reasonably worth, not exceeding $1.25 per dozen, the price "claimed in the bill of particulars, and less that sum, if the price is less."

This request was given, accompanied with the remark of the Judge—

"As I *recollect* the matter of evidence, there is no evidence of any "larger price, * * that price would govern as to the year 1868. "That request *is granted*." *Exception.*

Comment is not needed.

ARGUMENT FOR DEFENDANT IN ERROR.

FIRST.

This cause is brought up a second time, after a second trial has been had below upon issues framed in a *different manner and form*, from those of the *first* trial. The printed record contains the *entire* proceedings had upon *both* trials. This makes it needlessly voluminous and *misleading*, and we are unable to see *why* this has been done. Especially as the second trial was had upon a *submission of the cause by stipulation*, which *settled* the particular issues, without reference to the pleadings, prior to the stipulation.

We submit, that in reviewing the questions contained in the record relating to the *form* of the issues, guiding reference should be had, to this *stipulation*.

The cause was first tried by the court without a jury, under the *pleadings* given in the "*statement.*" The judge directed judgment for the defendant in error for $7,825.62, which was entered accordingly on April 15, 1875. (R., 31.)

On error brought, that judgment was reversed by this court at the October term, 1877,* and the cause remanded for a new trial. The mandate was filed in the court below, February 3, 1879. (R., pp. 36 and 37.) It has not been re-tried under the *pleadings* aforesaid; on the contrary, *new issues* were framed by the parties, expressly for the *purpose* of the new trial, and the evidence which might be received was thereby greatly enlarged.

Before entering upon the second trial, the parties *abandoned* the issues framed by the original pleadings, and substituted therefor a *general issue*, by stipulation; whereby after agreeing to the quantity of handles delivered, the time when shipped (R., p. 40) they further stipulated, as follows, viz:

*96 U. S., 324.

"The question of the *quality* of the handles delivered as aforesaid, and "*all other* questions of fact *not* stipulated, are LEFT OPEN to the jury, "and for *other and further* evidence. (R.. p. 41.)

This was in effect a general submission of all matters of difference, relating to the shovel handles.

This stipulation bears date April 1, 1879.

At the opening of the second trial, the counsel for the plaintiff below read to the court and jury the stipulation, (R., p. 50) as well the payments made, as the quantity of handles shipped, and the provision as to what evidence *should be submitted*

Clearly all questions of fact, which arose during the progress of the trial were open to evidence, under that stipulation, without restriction from the pleadings.

SECOND.

The court did not err in permitting the plaintiff, as witness, to answer the question, upon his re-direct examination, "What change was made "in the duplicate which you had?" This was objected to by the defendant's counsel, as incompetent and irrelevant.

The objection came too late to be of any effect, and was not well taken for other reasons.

STATEMENT.

From the bill of exceptions a dispute appears, concerning commissions on drafts, that had been drawn and accepted in 1867.

The defendants claimed that $2\frac{1}{2}$ per cent. commission was to be paid to them on *all* the drafts; while the plaintiff insisted that the commission was restricted to those drawn for *advances*, and was not to be paid on such as were drawn against shipments actually made.

It further appears that the contract for 1867 was signed in duplicate, each party taking one; and that the plaintiff had transacted all the business of that year under his, believing the other to be like it. But his duplicate had been destroyed by fire. (R. 56, f. 159)

The plaintiff was sworn as a witness, and on cross-examination he identified the defendant's copy of the contract, and it was read. The contract price of the handles exceeded $35,000.00. (R. 55, f. 157.) And the contract contained the following provision :

" For *advances* made we to charge Mr. Quimby six per cent. interest " and *accept* his drafts for sixty cents per dozen on the twenty five thous- " and dozen handles to be made and delivered *during* the year 1867. One- " third or $5,000, at thirty days, one-third or $5,000, at sixty days, and " one-third or $5,000, at 90 days sight, making $15,000 IN ALL. We " also agree *to allow* Mr. Quimby to draw on us, upon receipt of *bills of* " *lading*, for 45 cents per dozen *in addition* to the sixty cents *advanced* " him, making 105 cents per dozen. Mr. Quimby to pay us 2½ per cent. " commission FOR ACCEPTING his drafts." (Rec. 56, f. 158.)

The defendants claimed the commission on *all* drafts ; the plaintiff in sisted that he was to pay commission on *advances* only. But the contract left this uncertain. By its terms the advances were to draw interest : and the commissions might apply to the drafts for the 45 cents per dozen additional. Yet, that would make the plaintiff pay commission on drafts drawn against *his own funds* in the defendants' hands. The drafts were all on *time*. (60, 90 and 120 days. R. p. 40 and 41.) And, by the stipulation, each shipment had reached the defendants in 15 days. (R. 52.)

To remove this ambiguity, the plaintiff on re-examination, (after stating that he had a " duplicate " of the contract, and that it was burned,) was *allowed by the defendants' counsel to testify without objection*, as follows :

" The copy introduced is not an exact copy of the one I had, in its " reference to the 2½ per cent. commission. * * DRAFTS FOR HAND- " LES SHIPPED, I WAS TO PAY NO COMMISSION ON ; THOSE FOR ADVANCES " BEFORE SHIPMENTS I WAS TO PAY COMMISSION ON." (R. 56, f. 159.)

This important testimony was offered and received *without objection*. The defendants did not afterwards move to strike it out, nor request any charge concerning it. It went to the jury *by consent*.

Then followed the question objected to, viz :—

" What change was made in the duplicate which you had ? " The wit-

ness answered, "The word 'advanced' was inserted after the word "'drafts' and before the word 'and' near the close of the contract." (R. 56, f. 160.)

By inserting the word "advanced" where it was omitted in the duplicate produced, the contract will read as follows: "Mr. Quimby to pay us 2½ per cent commission for accepting his drafts, advanced"; which was what the witness but a moment before had sworn to, without objection, as being the terms of the contract.

I.

The objection came too late to make it available to the defendants. Their counsel had already permitted parol testimony to be received of the VERY SUBSTANCE of the question and answer. It is plain that the effect of the prior testimony on the court and jury would remain the same, with this question and answer ruled out.*

II.

The plaintiff had the same right to introduce *his* duplicate, (and to prove its contents, it being lost,) for the purpose of showing what the contract was, as the defendants had to introduce theirs. Each duplicate is an original †

III.

The defendant's duplicate, standing alone, left it uncertain what drafts the parties intended, when they employed the words "for accepting his drafts," (R., p. 56, line 9.) Did they mean all, or only those for advances, or those drawn against shipments?

The rule is, that other written instruments, which were executed between the same parties, at the same time, and respecting the same

* Lucas vs. Brooks, 18 Wall., 454.

† Crane vs. Portland, 9 Mich., 493.

subject, may be considered, in aid of the construction of any particular instrument, the terms of which are ambiguous.*

IV.

Having a right to introduce his duplicate, the plaintiff had an equal right to prove its contents upon showing its loss.

Again, the defendant's counsel placed the objection upon the further ground that, under the Michigan practice, the question was incompetent, because the plaintiff had not denied by affidavit, the execution of the contract—the defendants having stated it in their notice with their plea. (R., p. 56, f. 160.)

I.

A conclusive answer to this is, that the contract produced by the defendants is *not* the one described in their notice, but is quite different.

One clause in the contract stated in the notice, is in these words: "and "that for what handles were required and ordered by them, and for- "warded to them by the plaintiff before April 20, 1867, they would pay "*twelve and a half cents per dozen.*" (R., p. 24, f. 73.) But the one produced at the trial reads, "12½ cents per dozen EXTRA," (R., p. 55, f, 157), the general price being $1.25 per dozen. By the contract in the *notice*, the plaintiff might draw for 45 cents per dozen * * * "and was "to pay the *difference* of two dollars and a half commission." (R., p. 56, f. 158.)

We are unable to discover in what way a failure to deny signing *one* contract, could work an admission of the defendant's construction of *another*. That ground of objection is untenable.

* Cole vs. Wendel. 8 John, 116.
Cloyes vs. Swestser, 4 Cush., 403.
Bradley vs. Steam Packet Co., 13 Pet., 97-9.
2 Phill. Ev. (4 Am. Ed.,) 718.

II.

Besides, all the pleadings and notices had been *abandoned* before the trial began, and a new issue had been framed by stipulation, as shown on pages 8 and 9 of this brief, to which we refer.

III.

And clearly, a party, by admitting the execution of a contract, is not thereby precluded from insisting that *all* the writings which contain *any part of it* shall be br ught before the court.

IV.

The practice which requires parties to deny by affidavit with the general issue, the execution of the writing sued on, or set off, is under a rule of the Circuit Court adopted in 1878. There is no statute requiring it. A court may suspend the operation of its own rules of practice in its discretion, and no exception can be taken, unless a party has been injured; and then the remedy is by motion for a new trial, not by writ of error. A matter resting in the discretion of the court below, will not be reviewed.

There was no error in permitting the witness to answer the question His answer, coupled with the copy produced, furnished complete, the contents of the duplicate which had been burned.

THIRD.

The court did not err in receiving the evidence offered by the plaintiff, in reply, relating to the quality of handles furnished in 1867–8, which was objected to by defendants' counsel.

The defendants had introduced evidence which tended to show that the quality for these years was inferior to prior years.

The plaintiff having shown that he also furnished shovel handles in 1867–8 to the Old Colony Company, as well as to the defendants, and

from timber of the same selection, asked the witness Staples, an employe of the Old Colony Co:

"What was the quality of the handles furnished by the plaintiffs to "the Old Colony Co. in 1867 and 1868?" The objection was placed on the ground of *incompetency* and irrelevancy. Thereupon the plaintiff's counsel offered to show in connection, that handles of the same general quality were furnished to both, (R., p. 58, f. 165); and the witness answered "that the quality * * was good." (R., p. 59, f. 165.)

The supporting testimony, subsequently given, tended to show, that good timber was selected for *all* the handles made in 1867–8 "straight "white ash," (R., p. 59.) "thoroughly well made, (R., p. 59.) "The "timber and workmanship better than before." (R., p. 60). And that "$\frac{3}{4}$ of it went to the defendants, the same kind and quality to the Old "Colony Co." (R., p. 59.) And that it was the same timber and handles selected, manufactured and assorted at Grand Rapids.

I.

The evidence of the quality of the handles furnished by the plaintiff to the Old Colony Co. in '67 and 68, under the circumstances disclosed, was relevant. The handles were made for the Old Colony Company, and for the defendants, from the same selected stock of timber, of the same workmanship, and assorted alike.

II.

Similar objections and offers were likewise made, and supporting testimony given to the questions put to the plaintiff's witnesses Castline and McCormick, as to selecting and assorting the same timber and handles in '67 and '68. (R., p. 59.)

III.

Whether or not the supporting evidence was sufficient to obviate the objections made to the questions, will not be considered by this court,

because the Circuit Court was not asked to rule upon it, by motion to strike out, or request to charge.*

FOURTH.

The court did not err in receiving the evidence offered by the plaintiff, to show that the contract for the year 1865 was *executed* on January 1st, 1865, Sunday.

The objection of *incompetency* only, was grounded on the practice, in Michigan, as to denying by affidavit at the time of pleading, the execution of the written instrument sued on, or set off.

I.

But the local practice does not affect the question here presented at all. For the matter offered, confessed such execution and avoided it. (R. p. 60.)

The answer of the witness shows that the contract for 1865 "was "signed and delivered on Sunday afternoon, about 3 o'clock p. m., Janu- "ary 1st, 1865, in the defendant's office at North Easton, Massachu- "setts. (R., p. 60.)

II.

Under the Circuit Court Rule, a neglect to deny by affidavit the *execution* of the paper sued on, or set off, when the case is *proper* for such denial, merely obviates the necessity of proving the maker's *signature*. No defence on the merits is thereby excluded.

"The only object of the rule was to enable a plaintiff to make out a "*prima facie*, not a conclusive case, and it cannot preclude a defendant "from introducing any *defence on the merits* which does not contradict "the *execution* of the instrument introduced in evidence." Per Camp- bell, J.†

*Walker vs. Sauvinet, 92 U. S., 93.
Stephenson vs. Wilson, 50 Wis., 101.

† Freeman vs. Ellison, 37 Mich., 462.

III.

The contract for 1865 was void as a Massachusetts contract, being made on Sunday.*

And was equally void as a Michigan contract.†

FIFTH.

The record does not show that any errors were committed in charging the jury.

A.

The defendants' first request was to instruct the jury, "that under the "contract for 1866 the defendants were at liberty to charge the plaintiff "back, with the full value of such handles as broke in the process of "bending." (R., p. 62, top.)

The court read the request to the jury, and said: "that request should "be qualified * * the language of the contract is, that they should be "rejected '*as heretofore.*' Now, if the facts in the case show that the "method of rejecting was as claimed by the defendants, then there "would be no qualification to this request, but if the evidence shows "that the rejection was *only* when Quimby's *attention* was subsequently "called to the rejected handles, and *it was then settled between them*, as "to the amount of rejected or broken handles, then the qualification "should be made, as I understand the contract." (R., p. 62.)

To this ruling, charge and modification the defendant's counsel excepted.

I.

The contract was correctly stated in the charge. The defendants had "the privilege of rejecting *as heretofore* all handles which break in the "process of bending." (R., p. 55.) But how had it been done before? That was a matter of evidence.

* Day vs. McAllister, 15 Gray, 433.

† Tucker vs. Mowrey, 12 Mich., 378.

II.

The charge was correct in view of the testimony. Evidence on the part of the defendant tended to show that settlements had been made as to broken handles, on the basis of what the defendants had charged back—172 dozen in 1866, and 55 dozen in 1865. (R., p. 58, f. 163.) Yet on the part of the plaintiff, the evidence tended to show that *prior* to 1866 none had been settled for, as rejected by them; that in 1865, when defendants showed plaintiffs some 55 dozen which they claimed broke on bending, he *refused* to allow them. That plaintiff approved the defendants' statement of account for 1866 when presented, *except* the broken handles, which he *refused* to allow, "*as they did not belong to that* lot." The largest portion had not been bent. He refused to allow 172 dozen, but offered to allow 72 dozen. (R., 56, f. 158–9.) And "the "matter was referred to Oakes Ames, who *agreed to pay* $125, for 100 "dozen" of those claimed to have broken, (R., p. 60, f. 168), which left 72 dozen to be rejected in 1866.

The evidence did not go back of 1865; and the bill of exception shows that the parties "could not settle for the year 1865" (R., p. 56, f. 159,) "The operations for 1865 were not settled." (R., 58, f. 163.) On that point the witnesses for both parties agree. We submit that the request was too broad and required the modification complained of.

B.

The defendants second request related to the plaintiff's bill of particulars, and to the defendants orders for handles to be delivered before April 20, 1867—the opening of navigation.

The latter was given; (R., 62, f. 175) the former was not, and defendants' counsel excepted.

The part refused was as follows: "That after October 8th, 1866, the "plaintiff can only recover said extra price of 12½ cents per dozen, for "such handles as were charged on his bill of particluars, "at $1.37½, viz: 10,408 dozen," and the court also charged that if the plaintiff "has

made a *mistake* in carrying out the *price*, it is not binding," but that he was bound by the *number* of handles stated in his bill.

And to this charge the defendant's counsel excepted.

I.

But the plaintiff's bill of particulars was not put in evidence. It is not in the record. There is no evidence whatever of its contents. The statement by way of recital in the request, and the reference to a bill in the charge, are not sufficient to raise the question *

II.

The rule cannot be more strict as to prices stated in the bill of particulars than as to the items. The plaintiff may recover for items that are not stated in his bill, where it appears from the *defendant's* evidence that he is entitled to them.†

Now, the time fixed by the request is subsequent to Oct. 8, 1866. But the defendants introduced the contract dated Dec. 25, 1866, by which they agreed to pay $1.37½ per dozen for handles forwarded before April 20, 1867. (R., p. 55.) And by the stipulation, the parties agreed on the quantities shipped, and the time of receiving them by the defendants. (R., p. 50.) It also appears by the stipulation that the quantity forwarded from Feb. 2, '67, to April 13, '67, amounted to 11,498 dozen. (R., p 51.) The time for shipping under the contract for 1866 closed on Oct. 1, '66, (R., p. 54), and did not cover the *Nov. and Dec. shipments*, (R., p. 54 top.) Turning to the stipulation we find the shipments for Nov. and Dec. '66, amounted to only 2,852 dozen, (R., p. 51,) which is far within the number, (10,408 doz.) on which the price was carried out in the bill at $1.37½.

The refusal to charge was harmless, even if eroneous, which it was not. For upon the theory of the request the plaintiff could recover,

* Worthington vs. Mason, 101 U. S., 152
† Hurst vs. Watkis, 1 Camp., 68
Williams vs. Allen, 7 Cow., 316.

under the bill, up to its limit of 10,408 dozen; and under the *defendants proof*, for 11,498 dozen more, at 12½ extra. The instruction was properly refused as inapplicable to the case.*

III.

But the refusal to charge according to the request was right, on another ground. The request was clearly improper, as it included the handles covered by the *contract* of '67. A judge need not stop to separate the good from the bad; he may reject the whole.†

IV.

The judge was right in disregarding the mistake in the extension of price, in the bill of particulars, it being a mere clerical misprision, (R., p. 57) and the defendants not claiming to be mislead, or surprised by the evidence. The bill was amendable at the trial. U. S. R. S. § 954.‡

C.

The defendants' third and last request, as to the value of handles delivered in 1868, not exceeding $1.25 per dozen, was given. (R., p. 63.)

The remark of the judge in that connection, that he did not recollect any evidence of a higher price than $1.25, and "that would govern as to 1868," was not misleading. It was, in effect, that the jury should confine their inquiries within that limit.

I.

The request given, and the judge's remarks are to be read and construed together.§

* Ins. Co., vs. Baring, 20 Wall., 161.
† Hart vs. The Rensselaer & Saratoga R. R. Co. 4 Seld. 44 (top).
Beaver vs. Taylor, et al 93 U. S., 50.
Eagle & Phœnix Man'g. Co. vs. Gibson, 62 Ala., 369.
‡ Smith vs. Smith, 5 Wend., 48.
1 Burr. (N. Y.) Pr. (2 Ed.,) 433.
§ Castle vs. Bullard, 23 How., 190.

II.

It was a mere expression of the judge's opinion upon a question of fact, and is not a ground of error.*

In the whole record, we submit, that no questions, worthy of consideration by this court, are raised.

The issues and facts were mostly stipulated and agreed—*volenti non fit injuria.*

The errors assigned are trifling—largely questions of mere local practice. No rights, important or unimportant, of the plaintiff in error, are in jeopardy.

The judgment, greater than the first one, given by the District Judge, by the added interest for long delay and a lower allowance, if any, for broken and bad handles, if the jury found any, is altogether a *just* one.

Shall it not be affirmed? More meritorious cases, for plaintiffs in error than this, have been, by this court, with damages for delay.

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Of Counsel for Defendant in Error.

* Transportation Line vs. Hope, 95 U. S., 302.